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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1294

PATRICIA R. HARRIS, SECRETARY OF EDUCATION, AND WELFARE, APPELLANT

v.

AWILDA SANTIAGO ROSARIO, ET AL, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MOTION FOR SUMMARY AFFIRMANCE

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INDEX

Page

Opinion below ---------- 1

Motion to affirm ---------- 1

Question presented ---------- 2

Constitutional and Statutory provisions involved ---------- 2

Statement ---------- 4

Argument ---------- 8

1. Appellant brings again his contention that *Califano* v. *Torres*, 435 U.S.1 (1978) constitutes authority to reverse the decision below ---------- 8
2. Have the Appelles Standing to bring this suit? ---------- 10
3. Applicability of the Federal Constitutional Principles to Puerto Rico ---------- 14
4. The applicability of the Fundamental Rights Doctrine to the Case at bar — The Equal Protection of the Laws ---------- 15
5. Suspect Class ---------- 16
6. What reasons have been advanced by the appellant to justify the unequal treatment? ---------- 21

A. Tax Status of Puerto Rico ---------- 22

B. Cost of the Program ---------- 23

C. The Standard of Living in Puerto Rico 24

D. Unemployment - Disincentive to gainful employment ---------- 27

E. Disruption of Puerto Rico's economy ---------- 28

7. Presumption of Constitutionality of Welfare Laws ---------- 31
8. The different treatment does not meet the rational basis test of constitutionality - 32
Conclusion ---------- 33
Appendix A, I, II, III ---------- 1a
Appendix B ---------- 63a
Appendix C ---------- 72a
Appendix D ---------- 73a

CITATIONS

Cases:

Balzac v. *Puerto Rico*, 258 U.S. 298 (1922) - 14
Bolling v. *Sharpe*, 347 U.S. 497 (1954) ---- 15
Calero Toledo v. *Pearson Yatch Leasing Co.*, 416 U.S. 663 (1974) -------- 14
Califano v. *Torres*, 435 U.S.1 (1978) --- 8,9,10, 13,29,30
Downes v. *Bidwell*, 182 U.S. 244 (1901) --- 14
Graham v. *Richardson*, 430 U.S. 371 (1971) ---------- 17,23
Hampton v. *Non Sun Wong*, 426 U.S. 88 (1976) ---------- 24
Hartford v. *Town of Gastounbury*, 561 F 2d 1032 (1977) ---------- 13
James v. *Strange*, 407 U.S. 128 ---------- 23
Johnson v. *Richardson*, 415 U.S. --------- 23
Mathews v. *De Castro*, 429 U.S. 181 (1976) - 31
Molina Crespo v. *Califano*, 583 F 2d 572 ---------- 9,10,30,31
Montalvo v. *Colón*, 377 F. Supp. 1332 (1974) ---------- 14
Mora v. *Mejía*, 206 F. 2d. 377 (1953) ---- 6,14

Morton, Secretary of the Interior v. *Ruiz*, 415 U.S. 199 (1974) ---------- 23
Palmer v. *Thompson*, 403 U.S. 217 -------- 23
Reid v. *Covert*, 354 U.S.1 (1956) ---------- 15
Rodríguez Cintrón v. *Richardson*, Civil No. 1099-72 D.C.P.R. (April 7, 1975) ---------- 15,17
San Antonio Independent School District v. *Rodríguez*, 411 U.S. 1, (1973) ---------- 17
Schilb v. *Knebel*, 404 U.S. 356 ---------- 23
Schneider v. *Rusk*, 377 U.S. 163 (1963) ---- 15
Shapiro v. *Thompson*, 394 U.S.618 (1969) 15,23
Simon v. *Eastern Kentucky Welfare Rights Organizations*, 426 U.S. 26 ------- 11
Terry Torres v. *Commonwealth*, —U.S.— (1979) 47 L.W. 4716 (June 18, 1979) ----- 15
U.S. v. *Caroline Products*, 404 U.S. 144, (1938) ---------- 20
United States v. *Scrap*, 412 U.S.C. 669 (1973) 13
United States v. *Thompson*, 452 F 2d 1333 (1971), Cert. denied, 405 U.S. 1075 (1972) - 20

Constitution:

United States Constitution:
Article IV, Section 2 ---------- 5,14
Article IV, Section 3, Clause 2 ------- 2,3,5,15
Fifth Amendment, Due Process Clause --- 2,3, 6,7,8,9,10,16,23,24,30,31,32

Statutes:

Puerto Rico Federal Relations Act., Sec. 2 5, 14
Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763:
Section 802, 92 Stat. 2945 ---------- 3,23
Section 802(b)(1), 92 Stat. 2945 --------- 3
Social Security Act, 42 U.S.C. 301 *et seq.*:
Title IV,42 U.S.C. 601 *et seq.*: ------ 19,28,32

Title XI, 42 U.S.C. 1301 *et seq.*:

Section 1101(a)(8)(A),42, U.S.C. 1301(a)(8)(A) ---------- 3
Section 1108, 42 U.S.C. 1308 ---------- 3
Section 1108(a), 42 U.S.C. 1308 (a) 2,3,5,7,31
Section 1108(a)(1),42 U.S.C. 1308(a)(1) --- 3

Title XIX, 42 U.S.C. 1396 *et seq.*:

Section 1905(b), 42 U.S.C. 1396 d(b) ---------- 2,3,5,7,31
42 U.S.C. 1381 ---------- 8,9,19
48 U.S.C. 734 ---------- 21

Miscellaneous:

Cappalli, Richard B., *Excerpts from Discussion Paper on Testing the Constitutionality of Discriminations Against Puerto Rico in Federal Aid Programs*, Office of the Governor, San Juan, P.R. (Sept. 15, 1975) ---------- 23,33

Harris, Patricia Roberts, *Developmental Problems in the Concept of Citizenship With Particular Attention to the United States - Puerto Rico Citizenship*, 15, Howard Law Journal, 47 (1968) ------- 8,34

Maffei, Barbara O., *Eligibility of Territories and Possesions in Federal formula Assistance Programs*, Congressional Research Service, Library of Congress, Wash. D.C., (April 20, 1977) ---------- 33

95th Congress, First Sess. (1977) ------ 11,12

95th Congress, Second Sess. (1978) ------ 11

U.S. Department of Health, Education and Welfare, *Report of the Undersecretary's Advisory Group on Puerto Rico, Guam and the Virgin Islands*, (Oct. 1976) ------- 12,29

U.S. Department of Commerce, *Economic Study of Puerto Rico: Federal Programs and Policies*, Report III, (Oct. 1978) ----- 19

U.S. Department of Health, Education and Welfare, *Economic Study of Puerto Rico, Social Conditions and Human Services Programs*, a Federal Interagency Study Group, (Oct. 1978, released Feb. 1980) --- 24, 26,27,28.

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MOTION FOR SUMMARY AFFIRMANCE

OPINIONS BELOW

The opinions of the district court (Apps. A & B, infra, 1a-72a) are not reported.

MOTION TO AFFIRM

Appellees move that the summary judgement rendered on October 1, 1979, by the U.S. District Court

for the District of Puerto Rico be summarily affirmed or the grounds that it has been well settled that the equal protection component of the Due Process Clause of the U.S. Constitution is applicable to United States citizens residing in Puerto Rico; and that the different treatment of U.S. citizens living in Puerto Rico under the Aid to Families with Dependent Children Program of the Social Security Act is clearly unconstitutional in so far as they are violative of the equal protection guarantees to which the appellees are entitled. Therefore, the decision below is so obviously correct as to warrant no further review.

QUESTION PRESENTED

Whether the formulas applicable to Puerto Rico and the ceiling established by Congress for determining the reimbursement to the Commonwealth of Puerto Rico for payments made to the United States citizens who reside in Puerto Rico under the Aid to the families with Dependent Children Program ("AFDC"), as contained in Title 42, United States Code, Sections 1396 (d) (b) and 1308 (a) which impose a less favorable federal reimbursement formula and ceiling on that Program in Puerto Rico than in the 50 states, violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article IV, Section 3, Clause 2 of the Constitution provides in pertinent part:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

2. The Fifth Amendment to the Constitution provides in pertinent part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

3. Section 1905 (b) of the Social Security Act, 42 U.S.C. 1396d (b), provides in pertinent part:

The term "Federal medical assistance percentage" for any State shall be 100 per centum less the State percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum, and (2) the Federal medical assistance percentage for Puerto Rico, the Virgin Islands, and Guam shall be 50 per centum. The Federal medical assistance percentage for any State shall be determined and promulgated in accordance with the provisions of subparagraph (B) of section 1301 (a) (8) of this title. * * *

4. Section 1108 (a) (1) of the Social Security Act, 42 U.S.C. 1308 (a) (1), as amended by Section 802 (b) (1) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2945, provides in pertinent part:

* * * The total amount certified by the Secretary of Health, Education, and Welfare under subchapter, I, X, XIV, and XVI of this chapter, and under part A of

subchapter IV of this chapter (exclusive of any amounts of this section applies) —

(1) for payment to Puerto Rico shall not exceed

(A) $12,500,000 with respect to the fiscal year 1968.

(B) $15,000,000 with respect to the fiscal year 1969.

(C) $18,000,000 with respect to the fiscal year 1970.

(D) $21,000,000 with respect to the fiscal year 1971.

(E) $24,000,000 with respect to the fiscal year 1972 and each fiscal year thereafter other than the fiscal year 1979, or

(F) $72,000,000 with respect to the fiscal year 1979;

STATEMENT

Appellees are the representatives of a class of United States citizens residing in the Commonwealth of Puerto Rico, which are recipients of public assistance under the Aid to the Families With Dependent Children (AFDC) category that have been, are, and will be discriminated against solely on the basis of their residence. The case was certified as a class action by the U.S. District Court For the District of Puerto Rico on September 2, 1977 (App. A, infra, 2a.)

Appellees have challenged the constituionality of the formulas applicable to Puerto Rico and the ceiling established by Congress for determining the reimbursement to the Commonwealth of Puerto Rico

for payments made to United States citizens who reside in Puerto Rico under the Aid to the Families With Dependent Children Program (AFDC), as contained in Title 42, U.S.C. Sections 1396 (d) (b) and 1308 (a).

Appellees allege that the formula and ceiling limitations in themselves create an arbitrary and discriminatory distinction against a suspect class, the United States citizens residing in Puerto Rico, violative in itself of the fundamental right to the equal treatment to which they as United States citizens are entitled, in violation of the Equal Protection of the laws component of the Due Process Clause of the United States Constitution. (Privileges and Immunities Clause, Article IV, Section 2, of the Federal Constitution; Sec. 2 Puerto Rico Federal Relations Act.[1] (App. A, infra 8a-9a,)[2] [3]. The appellees have additionally argued that no compelling state interest justifies the different treatment and that no rational purpose lies

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[1] "The rights, privileges and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of Section 2 of Article IV the Constitution of the United States".

[2] This privileges and immunities provision was the only part of the Bill of Rights in the Jones Act which was retained in the Federal Relations Act. This is at least indicative of the fact that the provisions therein contained attached not to the nature of the political organization of the people of Puerto Rico — be it a Territory governed under the Territorial clause, or a Commonwealth related to the United States in the nature of a compact — but that they were attributes accorded to the United States citizenship itself.

[3] That the problem before us is not the political nature of the status of Puerto Rico but the essential nature of the United States citizenship for Puerto Ricans is something that was long ago recognized by the

behind the distinction. Appellees have never alleged (the record will show) that they have a fundamental right to receive welfare benefits and emphatically reject appellants contention suggesting that the court below considered that as our position (appellant's jurisdictional statesment footnote nine 9 at page eight 8).

As the Honorable Court in the opinion below very accurately expressed, the appellees contend that,... "once Congress has decided to grant the United States citizens certain rights then the exclusion of some of those citizens from enjoying those rights must be treated with suspicion not because the satutory right is fundamental but because it is fundamental that United States citizens be accorded the equal protection of the laws unless a compelling state interest otherwise so dictate. (App. A, infra 13a - 14a).

Appellees have also contended that the different treatment violates the rational basis test of the Equal Protection clause in that it does not further the purpose for which the program was created. No compelling state interest exists that justifies the distinction made.

On August 17, 1978 the Court below denied the appellant's motion for summary judgement (App. A) and on October 1979 rendered its Opinion and Order denying appellants' motion to dismiss, granting partial summary judgement to the appellees, holding

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Court of Appeals for the First Circuit when it stated in *Mora* v. *Mejía*, supra, that "...the important point is that there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States".

that Sections 1905 (b) and 1108 of the Act are unconstitutional (App. A, infra 1a - 44a). The Court, in summary, concluded that the differences in AFDC formulas between Puerto Rico and the fifty states, and the ceilings on reimbursements applicable to Puerto Rico violate the equal protection component of the Due Process Clause of the Fifth Amendment. The Court concluded that the United States citizens residing in Puerto Rico constituted a "suspect class"; that the power of Congress to legislate over the territories could not affect the attributes accorded to the United States citizenship itself; that the Fifth Amendment to the United States Constitution binds the Federal Government in its excercise of power over the residents of Puerto Rico and that the United States citizens residing in Puerto Rico are protected by the principles of equal proctection contained in the Fifth Amendment. (App A, 5a - 10a); that the fundamental right at stake here is the guarantee of equal protection in itself; that no valid compelling state interest to justify the classification was presented by the appellant, and that such classfication operates contrary to the rational purpose of the legislation. Therefore the Court declared that Sections 1396 (d) (b) and 1308 (a), of 42 U.S.C., Social Security Act are unconstitutional because they create an arbitrary and invidious distinction against a suspect class, the United States citizens residing in Puerto Rico, and infringes on their fundamental right to equal treatment, thereby violating the Equal Protection Guarantee included in the Due Process Clause of the Fifth Amendment to the United States Constitution. (App. A Pag. 27a).

ARGUMENT

> "Where, as in the case of Puerto Rico, the persons whose rights are to be determined are United States citizens, there seems to be little legal justification for applying a different practical standard based upon the fact that the individual resides in Puerto Rico."
>
> Appellant Patricia Roberts Harris, *Developmental Problems in the Concept of Citizenship with Particular Attention to the United States-Puerto Rico Citizenship*, 15 Howard Law Journal 47 (1968), at p. 53.

The following are the major issues present in this appeal.

1. APPELLANT BRINGS AGAIN HIS CONTENTION THAT *CALIFANO* V. *TORRES*, 435 U.S. 1 (1978) CONSTITUTES AUTHORITY TO REVERSE THE DECISION BELOW.

Appellant has relied heavily in *Califano* v. *Torres*, supra, contending that the applicability of that case to the present one renders our equal protection claim without merit (See appellant's jurisdictional statement at pags. 9 and 12). The two issues presented in *Torres* were whether th e exclusion of Puerto Rico from the Supplemental Security Income Program (SSI) burdened the right of interstate travel, and whether that exclusion violated the Equal Protection Component of the Due Process of the Fifth Amendment.

Appellees hold that in *Torres* the Court only ruled on the right to travel issue and that the Court only made a footnote reference to what it believed the district court was acknowledging (Ibid at p. 4 n. 4).

The District Court, in its Opinion denying Califano's motion for summary judgment, dated August 17, 1978, upheld our interpretation of *Torres*, stating that it could not "conclude that the decision of the Supreme Court in *Califano* v. *Torres*, squarely faced and ruled upon the equal protection claims." (App. B at p.) A few weeks later, on September 23, 1978, the First Circuit Court expressed a similar interpretation on the applicability of the per curiam decision in *Torres* to *Elisa Molina Crespo* v. *Califano*, 583 F2d. 572. (1979)

In *Molina Crespo* v. *Califano*, supra, interpreting the applicability of *Califano* v. *Torres*, supra, the Court of Appeals for the First Circuit held that *Torres*, supra, was directed to the question of the Constitutional right to travel and that even thought the case raised the equal protection claim it was not decided beyond question by the Supreme Court of the U.S.A.

The reference made by the Court, to what the district court "apparently acknowledged" did not persuade the Circuit Court as clearly foreclosing the equal protection issue. It expressed the following:

"Torres in passing said:

> "The complaint had also relied on the equal protection component of the Due Process Clause of the Fifth Amendment in Attracting (sic) the exclusion of Puerto Rico from the SSI Program
>
> . . . . . .
>
> . . . . . But the District Court apparently acknowledged that

Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it. Pureto (Sic) Rico has a relationship to the United States that has no parallel in our history." *Torres*, supra, 46 U.S.L.W. at 3540 N.4 (citation omitted).

The Circuit Court held that:

"We cannot read this reference to what the district Court apparently acknowledged as clearly foreclosing the equal protection issue. The only statement that the Court makes on its own authority is that Puerto Rico's relationship to the United States is unique. Standing that alone certainly does not dispose of all equal protection challenges to laws treating Puerto Ricans differently from residents of the fifty states. Nor does the Court's reference in the text to the presumption of constitutionality accorded laws providing for governmental payment of monetary benefits, id at 3540, dispose of this case". *Molina Crespo* v. *Califano*, supra.

The full question stands now for consideration by this Honorable Court.

2. HAVE THE APPELLEES STANDING TO BRING THIS SUIT?

The appellant has questioned the appellees standing to bring this suit. This issue was resolved by the court below on August 17, 1978, in favor of the appellees stating that a nexus or chain of causality existed connecting the defendants with the alleged wrong and that the plaintiffs' claim was not one of speculative injury which would deprive them of the required

"personal stake" so as to grant them standing to bring this suit. (App. B, pag.)

Specifically the appellant has questioned whether appellees have standing to bring this suit stating that appellees have not suffered an "injury that fairly can be traced to the challenged" AFDC funding statutes, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426, U.S. 26, 41-42 (1976). (See Appellant's jurisdictional Statment at p. 10) They claim that the dollar amounts of benefits payable to AFDC recipients depends solely upon the local determination of need and payment levels.

Appellees provided the lower court with the Congressional Testimony of the co-defendant in this case, the Hon. Jenaro Collazo Secretary of the Department of Social Services of Puerto Rico[4]; the Congressional Testimony of the Governor of Puerto Rico the Hon. Carlos Romero Barceló[5]; and the Congressional Testimony of Puerto Rico's only elected official in the U.S. Congress, the Resident Commissioner Baltasar Corrada del Río,[6] wherein they requested equal treatment for AFDC and other public assistance categories, urging Congress to give Puerto Rico state-like treatment by eliminating the ceilings and formulas applicable to Puerto Rico. The Governor, additionally, promised that if Congress would do this he would recommend to the Legislature to "appropiate

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[4] Ninety-Fifth Congress, First Session, May 2, 1977 and July 18, 1977.

[5] Ninety-Fifth Congress, First Session on H.R. 7200, July 18, 1977

[6] Ninety-Fifth Congress, First Session, May 2, 1977; July 18, 1977 and Second Session, April 25, 1978.

additional funds" for these programs.[7] Being that the Governor is the President of the political party in the mayority of both houses of the Puerto Rico Legislature, such recomendation to increase AFDC funding has every likelyhood of becoming law.

Above all, the testimony of these three top policy makers attests to the fact that they hold the unequal treatment of the Social Security laws to be the main or sole factor causing AFDC benefits to be so low in Puerto Rico. By not appealing the decision of the District Court, co-defendant Hon. Jenaro Collazo accepts the opinion of the lower court. This fact, together with their previous position expressed in detail by the stipulations submitted by the parties and made part of the lower court's opinion (App. A, pags. 39a-44a) clearly shows their willingness to raise AFDC cash benefits to recipients in Puerto Rico. These facts leave no doubt that the injuries to the appellees are directly traceable to the challenged AFDC Statutes.

The allegation by the appellant that appellees lack standing because "even if the federal government began reimbursing 83% of Puerto Rico's AFDC costs, it does not follow that appellees would receive greater AFDC benefits", goes well againts the findings of a special team from HEW who studied this problem closely and came up with precisely the opposite opinion. The Department of Health, Education and Welfare, *Report of the Undersecretary's Advisory Group on Puerto Rico, Guam and the Virgin Islands* (October 1976) (which was cited by the Supreme

[7] (Testimony of Governor Carlos Romero Barceló before the Sub-Committee on Public Assistance of the U.S. Senate on July 18, 1977).

Court in *Califano* v. *Torres*, 435 U.S. 1 at p. 4.n.7) states in the sypnopsis at page 2 that:

> "To summarize briefly, the Advisory Group has concluded that the current fiscal treatment of Puerto Rico and the Territories under the Social Security Act is *unduly discriminatory* and unfairly restricts the ability of these jurisdictions to meet their public assistance needs." p. 2

The HEW Report goes on further in the same page to indicate that while the commonwealth relationship with the Federal government does not confer the same fiscal rights as are enjoyed by a State, neither does it justify a truncated funding approach whose main burden falls on the income assistance programs.

Over and over again the lengthy Report reaches the same conclusion, ie. that "the practical effect of the Federal ceiling on cash assistance has been to depress the Commonwealth's ability and willingness to operate its AFDC program". (Ibid at p. 41.) And we conclude that the appellees do in fact have standing, because as the intended primary beneficiaries of the Act they are being caused injury by the challenged AFDC funding statutes and stand to benefit directly from the relief sought, not based on speculation, but on the formal studies of the Department of HEW and by the personal commitments by the officials at the State level with the responsibility to implement any changes which may be forthcoming. See, *Hartford* v. *Town of Gastounbury*, 561 F 2d 1032 (1977); *United States* v. *Scrap* 412 U.S.C. 669 (1973)

3. APPLICABILITY OF THE FEDERAL CONSTITUTIONAL PRINCIPLES TO PUERTO RICO:

Even though there is still a lot of confusion regarding the extent of the applicability of the United States Constitution to the people of Puerto Rico, the Priviledges and Immunities Clause of A. ticle IV, Section 2, of the Federal Constitution is applicable to the Commonwealth of Puerto Rico beyond question. It is specifically stated in the Puerto Rico Federal Relations Act:

> "The rights, privileges and Immunities Clause of the citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a state of the Union and subject to the provisions of paragraph 1 of section 2 of Article IV of the Constitution of the United States". Sec. 2 P.R. Federal Relations Act.

Appellees contend, and the lower Court clearly expressed in its opinion at pag. 10a, that they are entitled to the protection of the fundamental rights of the United States Constitution, more specifically to the Guarantee of the Equal Protection of the Laws embodied in the Due Process Clause of the Constitution of the United States. *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Balzac* v. *Puerto Rico*, 258 U.S. 298 (1922); *Montalvo* v. *Colón*, 377 F. Supp. 1332 (1974); *Mora* v. *Mejía*, 206 F. 2d. 377 382 (1953); Calero. In *Toledo* v. *Pearson Yatch Leasing Co.*, 416 U.S. 663 (1974), the Supreme Court of the United States reaffirmed the fact that the righ to due process of law is fully applicable in the Commonwealth of Puerto Rico. See also,

Reid v. *Covert*, 354 U.S. 1 (1956); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schneider* v. *Rusk*, 377 U.S. 163 (1963) *Rodríguez Cintrón* v. *Richardson*, civil no. 1099-72 DCPR, April 7, 1975 (included here as part of appendix A at pag.45a); *Terry Torres* v.*Commonwealth*, —U.S.— (1979) 47 L.W. 4716 (June 18, 1979).

Congress could never enact legislation in violation of the fundamental rights because they are embodied in constitutional limitations which go to the very roots of the power of Congress to legislate. These restrictions apply to Congress when legislating in all fields and on all occasions. See *Bolling* v. *Sharpe*, 347 U.S. 497, (1954). (Opinion of the District Court, App. A, Pag. 10a-11a)

This Court in the case of *Terry Torres* v. *Commonwealth* supra, decided on June 19, 1979, cleary stated that the Constitution binds Congress in the exercise of its power over residents of Puerto Rico regardless of the powers under the Territorial Clause. It has held that the doctrine of territorial powers of Congress should not be given "any further expansion". *Reid* v. *Covert* and *Terry Torres* v. *Commonwealth*, supra. Nevertheless, the privileges and immunities of the United States Constitution are attached, not to the nature of the political organization of the people of Puerto Rico be it a territory or a Commonwealth related to the United States in the nature of a compact, but to the attributes accorded to the United States citizenship itself (App. A, p. 9a).

4. THE APPLICABILITY OF THE FUNDAMENTAL RIGHTS DOCTRINE TO THE CASE AT

BAR. THE EQUAL PROTECTION OF THE LAWS.

As already expressed, the Fifth Amendment to the United States Constitution binds the Federal Government in its exercise of power over the residents of Puerto Rico. Therefore United States citizens residing in Puerto Rico are protected by the principles of equal protection.

The fundamental right at stake here is the guarantee of the equal protection in itself and not the right to receive more welfare. As was said by the lower Court in its opinion, "... Once Congress has decided to grant the United States citizens certain rights then the exclusion of some of those citizens from enjoying those rights must be treated with suspicion not because the statutory right is fundamental but because it is fundamental that United States citizens be accorded the equal protection of the laws unless a compelling state interest otherwise so dictate" (App. A p. 14a)

5. SUSPECT CLASS

The appellees claim, and the lower court held, that the exclusion of the United States citizens residing in Puerto Rico, caused by the statutes herein attacked, creates a "Suspect Class" which invites the Strict Scrutiny Test in search for a compelling state interest. The exclusion creates a suspect classification which does not stand the strict constitutional scrutiny in absence of a compelling valid state interest.

The District Court has favored our contention that United States citizens residing in Puerto Rico have the "indicia of suspectness" necessary to invoke the strict scrutiny test and qualify as an example of a

"discrete an insular minority" for whom a heightened judicial solicitude is appropriate. *Graham* v. *Richardson*, 430 U.S. 371, 375 (1971).

The class meets the three traditional indicia of suspectness established by the U.S. Supreme Court: the class dissabilities, the history of purposeful unequal treatment and the position of political powerlessness. *San Antonio Independent School Distric* v. *Rodríguez* 411 U.S. 1, (1973); *Jesús Rodríguez Cintrón* v. *Elliot Richardson*, in the United States District Court for the District of Puerto Rico, civil No. 1099-72, opinion dated April 7, 1975, which was made part of the opinion of the lower court (see page 24a of Appendix A), appears as Appendix A-III in this motion to affirm.

In *Rodríguez* v. *Cintrón*, supra, the Court entered into the reasons why the class presents the standards of suspectness: even when the residents of Puerto Rico were granted U.S. citizenship in 1917, their political condition under the American system of government could hardly be considered equal; U.S. citizens in Puerto Rico are in a position of political powerlessness with respect to the Acts of the Federal Government, executive or legislative. United States citizens residing in Puerto Rico are completely desisfranchised. Besides that, the class is saddled with outstanding dissabilities and possesses a history of unequal treatment.

A United States citizen residing in Puerto Rico, however, cannot vote in presidential elections, simply because Puerto Rico is not represented in the electoral college (which is open only to the States and, by the 23rd Amendment, to the District of Columbia).

And he, as distinct from Puerto Ricans living in California or any other State, cannot vote for Senators or Representatives in the Congress inasmuch as Puerto Rico, not being a State, has no Senators or Representatives in the National legislature. Yet he does have, by extension at least, a voice in the deliberations of the House. A Resident Commissioner from Puerto Rico is elected every four years to sit in that House; and he has the right to speak both on the floor and in committee. He cannot, however, vote on the floor, although he can in committee.

Throughout the last eighty years, Congress when enacting legislation for the States and Puerto Rico has oftentimes treated the latter differently. The differential treatment has consisted at times of excluding Puerto Rico from the benefits of certain enactments, other times by setting statutory limitations on the federal payments under each program, in certain instances by enacting legislation applicable only to Puerto Rico or to a group of territories, and finally by setting higher matching formulas for the Island than those required for the States. The historical patterns and the precedents offered by the Island's treatment under different legislative acts do not provide a uniform rule with which one can trace previous Congressional policy. Neverthless, in recent years, as federal aid for the Island as well as the Nation, has increased, the differential treatment between Puerto Rico and the States has become mor striking.

SUMMARY OF DIFFERENTIAL TREATMENT ACCORDED TO PUERTO RICO IN MAJOR FEDERAL ASSISTANCE PROGRAM[8]

Program	States and Puerto Rico	District of Columbia
1) General Revenue Sharing	Excluded	100% Federal
Supplemental Security Income (SSI)-Title XVI of SSA	Excluded	100% Federal
3) Prouty-Title II of SSA	Excluded	100% Federal
4) AFDC-(Title IV of SSA) and Adult Categorical Programs (OA, AB, APTD)	Ceiling: $24 million Match: 50%	No Ceiling* 50-83%
5) Social Services-Title XX of SSA	Ceiling: $15 million * * Match: 75%	$2.5 billion 75%
6) Medicaid-Title XIX of SSA	Ceiling: $30 million Match: 50%	No Ceiling 50-83%

[8] See, *Economic Study of Puerto Rico: Federal Programs and Policies*, U.S. Department of Commerce, October 1978, Report III, at p. 39.

* Adult categorial programs replaced by SSI.

** Funds available to Puerto Rico only if unused by the States.

7) Educationally Deprived Children-Title I of ESEA	Ceiling of 75% of formula allocation	100% /Federal
8) Anti-Recessional Financial Assistance (ARFA)	"Set aside" of 1%* * * of National appropriation	100% Fderal to be distributed according to state unemployment rate above 6%

The provisions of the Social Security Act pertaining to the AFDC Program were not extended to Puerto Rico until the year of 1950, even though said legislation was enacted by Congress in 1935. When it was extended to Puerto Rico it came accompanied by a ceiling restriction and a different formula to allocate the federal funds to carry out the Program. (See App. A, I at 29a - 34a).

The statutory provisions involved established a distinction within the class of needy AFDC households based on their place of residence. See *United States* v. *Thompson*, 452 F. 2d. 1333 (1971), cert. denied, 405 U.S. 1075 (1972). Besides that, the class participates of the characteristics of a discrete and insular minority, *U.S.* v. *Caroline Products*, 404 U.S. 144, 153-53 (1938). This definitely is an invidious classification

*** 1% of national appropriation distributed among Puerto Rico, Guam, the Virgin Islands, and American Samoa according to each's share of the total population.

and therefore subject to strict judicial scrutiny.[9] This classifications cannot be sustained either by the application of the strict scrutiny test, looking for a compelling state interest, nor by the rational basis test, since no valid reason justifies the exclusion, nor does the challenged classification further the legislative intent which this legislation was enacted.

6. WHAT REASONS HAVE BEEN ADVANCED BY THE APPELLANT TO JUSTIFY THE UNEQUAL TREATMENT?

They contend that a significant economic difference exists between Puerto Rico and the United States, particularly: (1) That the residents of Puerto Rico do not pay income taxes (48 U.S.C. 734). (2) That funding AFDC and similar social services programs would result in an "enormous cost". (3) That the "standard of living" in Puerto Rico is substantially below that in the continental U.S.A. (4) That an unduly large amount of federal welfare money might increase greatly the percentage of the population receiving welfare, providing a desincentive to gainful employment, and (5) that it would further disrupt Puerto Rico's troubled economy (See appellant's jurisdictional statement at pages 12 13).

[9] The District Court in its opinion stated the following which further clarifies our position as to the validity of the classification.

> "Defendant contends that the exclusion was not intended to apply to residents of Puerto Rico as a class, as it also excludes those from Virgin Islands, Guam, American Samoa and that residents of Puerto Rico would not be excluded from the benefit should they live in the fifty states or the District of Columbia. Defendant argues that the classification is based on geography and not to discriminate against American citizens who reside in Puerto Rico. This reasoning we must rejec as fallacious. The sim-

As the lower court very well expressed it, "we fail to find in such arguments either a compelling state interest or even a rational relation to the purpose of the statute" (District Court opinion, App. A, p. 19a). Let us analize each argument more closely.

A. TAX STATUS OF PUERTO RICANS

As for the tax argument we will quote from a statement of the Honorable Secretary of the Department of Social Services, Hon. Jenaro Collazo (Co-defendant at the District Court level) which clearly covers appellees position.

> "Since Public Assistance programs are thus designed for the benefit of people who are not usually taxpayers, making benefits contingent upon the payment of taxes would contradict the very purpose and public policy behind the legislation"... "The facts are that our local funds are limited because of lack of resources even though local taxes in Puerto Rico are exceedinly high". See stipulations between the plaintiffs and Hon. Jenaro Collazo, Secretary of the Department of Social Services of Puerto Rico., (App. A, II, pags. 40a, 42a)

These programs are consciously redistributional in nature; aiming at redistributing income from those who have resources to those who do not. Puerto Ricans do not pay Federal taxes because of the Con-

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ple fact that in order to receive the benefits American citizens residing in Puerto Rico would have to move out to the fifty states or the District of Columbia is tantamount to discriminatory treatment. Although the exclusion applied is designed in terms of geographical exclusion, the effect to the exclusion is on the American citizens who are residents of Puerto Rico". (App. A, p. 18a).

gressional judgement that the Island, as a whole, is too poor to be able to contribute. Therefore, rather than being a justification for lower Federal benefit levels in Puerto Rico, the fact of no Federal taxes are paid is an argument in favor of the full aplication of Federal Aid.[10] See *Shapiro* v. *Thompson* supra. See also the District Court's opinion (App. A, pags. 22a-23a).[11]

B. COST OF THE PROGRAM

The concern of Congress for the cost of the program cannot justify an indivious discrimination, *Shapiro* v. *Thompson*, supra *Graham* v. *Richardson*, 403 U.S. 3712 (1971), *Morton, Secretary of the Interior* v. *Ruiz*, 415 U.S. 199 (1974) Citizens may not be complelled to forego constitutional rights under the equal protections clause because officials fear public hostility or desire to save money. *Palmer* v. *Thompson*, 403 U.S. 217. A basic command of equal protections is that justice be applied equally to poor man or affuent man, *Schilb* v. *Knebel*, 404 U.S. 356. See also *James* v. *Strange*, 407 U.S. 128, *Johnson* v. *Richardson*, 415 U.S.

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[10] See, Richard B. Cappalli "Excerpt from Discussion Paper on Testing the Constitutionality of Discriminations Against Puerto Rico in Federal Aid Program", (San Juan, Puerto Rico, Office of the Governor, September 5, 1975).

[11] "We may add that to take the fact of nonpayment of taxes into consideration for the purpose of validating the exclusion of ... (sic) antithetical to the moral and constitutional principles upon which our nation is based and repugnant to the idea of equality of all its citizens., American citizens residents of Puerto Rico may be called into the Armed Forces and have given many lives in the defense of the nation. They have migrated through and live in many states, working in the several states and contributing to the growth and culture of the nation. See *Graham* v. *Richardson*, supra.

The Federal sovereign, like the states, must govern impartially the concept of equal justicie under the law being served by the Fifth Amendment's Guarantee of due process as well as by the Equal Protection Clause of the Fourteenth Amendment. It should be clear that congressional concern for fiscal integrity cannot be achieved by excluding Unites States citizens residing in Puerto Rico from the benefits available to the rest of the nation. See *Hampton* v. *Non. Sun Wong;* 426 U.S. 88, 1976; District Court's opinion (App. A. pags. 25a - 27a) and appellees memorandum of law in opposition to Defendant's Motion to Dismiss, June 1979, pages 20 - 22 which is part of the record in this case.

Therefore, the "enormous cost" of implementing the AFDC Program in Puerto Rico should not be considered a valid reason to treat Puerto Ricans, citizens of the United States, in a different manner.

C. THE STANDARD OF LIVING IN PUERTO RICO

Appellants further contends that since "the standard of living in Puerto Rico is substantially below than in the United States, an unduly large amount of federal welfare money might increase greatly the percentage of the population receiving welfare, thereby providing a disincentive to gainful employment.

As to appellant's first assertion that the "standard of living in Puerto Rico is substantially below than in the U.S.A." appellees will only have to quote directly from a very recent study, *Economic Study of Puerto Rico, Social Conditions and Human Services Program,* a Federal Interagency Study Group, U.S.

Department of Health, Education and Welfare, dated October 1978, which was disclosed during the month of February 1980, at pags. 33-34.

> "A Concept of "relative" poverty or "relative" cost of living could be used to argue that while prices of some, perhaps most, goods and services are higher in Puerto Rico than in the U.S. mainland, the "cost of living" is lower because Puerto Ricans have or are used to a lower "standard of living." However, care must be exercised in using these expressions. Any traveler to Puerto Rico can observe that the manner or style of life and expectations for housing, transportation, medical services, education, and nutrition in San Juan or any large city in Puerto Rico are similar in most respects to those in large cities in the U.S. mainland. It would be difficult to conclude scientifically that residents of Puerto Rico need less food, housing, medical care, and other services or they have lower expectations than in other parts of the United States.

Given the above description of chronic poverty in Puerto Rico, one question which should be addressed is why poverty in Puerto Rico is so widespread. Included in the answer to this question of poverty should be, in words of a U.S. Department of Commerce Guideline for this Interagency Study on Puerto Rico, an "attempt to assess the extent to which Puerto Rico's problems are structural and likely to persist even in periods of high economic activity" —or, it might be added, in periods of high and increasing levels

of various income transfer programs to and within Puerto Rico. In this connection, it is necessary to examine unemployment and population".

The fact is that sixty-two percent of all residents of Puerto Rico in 1975 were poor when their incomes are compared to the U.S. official poverty measure. *The Study*, supra, further says "poverty may be more extensive than the statistics indicate because of a *higher cost of living in Puerto Rico.*[12]

When we examine the validity of the assertion that the cost of living in Puerto Rico is considerably higher than in the U.S.A., we find that it is based on reality and evidenced by specific facts. The cost of food in Puerto Rico is higher than in the United States due in large part to the costs of importing from the U.S. mainland over half of all food consumed in Puerto Rico. Another indication of a higher cost of living in Puerto Rico may be provided by a recently updated United States Civil Service Commission study comparing the cost of living of Federal employees in San Juan with that in Washington, D.C., itself acknowledged to be a "high cost" city. On the basis of this study, the supplemental cost-of-living allowance long provided to elegible Federal employees in Puerto Rico was revised in late 1977 to 12.5% for the San Juan Standard Metropolitan Statistical Area and 5% for the rest of Puerto Rico. Similar adjustments are made in per diem allowance given to

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[12] *Economic Study of Puerto Rico, Social Conditions and Human Services Programs*, a Federal Interagency Study Group, U.S. Department of Health, Education and Welfare, October 1978, 1t pags. 28-29.

Federal employees while on official travel in Puerto Rico.[13]

D. UNEMPLOYMENT - DISINCENTIVE TO GAINFUL EMPLOYMENT.

We should now analize the second part of appellant's assertion that an unduly large amount of federal welfare money might increase greatly the percentage of the population receiving welfare, thereby providing a disincentive to gainful employment. The potential increase of people seeking AFDC benefits is not a valid compelling state interest. Besides, the problem of unemployment in Puerto Rico has a long history which can not be traced as the result of an excesive, nor even an adequate, amount of federal aid coming into the Island. The problem of unemployment, and governmental attempts to solve it, has long existed in Puerto Rico. Attempts to solve it have gone from a dependence on private enterprise and various outmigration projects of private or public sponsorship, to the injection of federal aid during the economic depression of the 1930's and during the last forty years, to the implementation of economic development planning for the "battle of production". Nevertheless, all these measures have failed in solving the unemployment problem in Puerto Rico. According to conventional U.S. Standard labor force statistics available from 1940 to the present, the unemployment rate in Puerto Rico has ranged from 11 percent in 1940 to a low of 10 percent in 1970 and

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[13] *Economic Study of Puerto Rico*, ... at pags. 30-33.

then increased sharply to an all time annual high of 22 percent in 1977.[14]

To say that an equal treatment in the apportionment of federal money for the implementation of the AFDC Program in Puerto Rico will "provide a desincentive to gainful employment" in the people of this Island is to superficially treat a problem very difficult to solve. The causes are much more deeply rooted. Appellant has presented such an argument without any scientific data to support it. It is merely based on speculations which we find totally contrary to the expressed purpose of the legislation which created the AFDC Program.

The economic reality of Puerto Rico together with the high rate of unemployment should operate in favor of more federal aid to the Island directed at helping needy families with dependent children for the purpose of encouraging the care of such children in their own homes or in the homes of relatives, and to enable the government of Puerto Rico to furnish financial assistance and rehabilitation and other services, to help maintain and strengthen family life and to help such parents to attain or retain capability for the maximum self support and personal independence consistent with the maintenance of continuing parental care and protection. (Social Security Act 42 USC§ 601 et. seq.)

Therefore, appelles also reject this reason as a valid one to justify the unequal treatment.

E. DISRUPTION OF PUERTO RICO'S TROUBLED ECONOMY.

[14] *The Study*, supra at p. 34.

In regard to appellant's contention that more welfare aid will contribute to the disruption of Puerto Rico's troubled economy, appellees also regard this as a speculative non-valid reason for the unequal treatment which has no scientific basis to support it. More so, the experience of Puerto Rico with the Food Stamp Program has demonstrated that a large influx of federal money will not disrupt the economy of the Island. This should be the example to examine. (See on the subject *HEW's Report from the Undersecretary's Advisory Group Study*, October 1976, supra, and the *Economic Study of Puerto Rico*, a Federal Interagency Study Group, October 1978, supra).

In summary, the cost of living for all families in Puerto Rico is higher than in any of the fifty states or Washington, D.C.. Additionally the disincentive to work which the appellant argues would result from higher welfare benefits, is not likely to occur in an economy like Puerto Rico's where 22 percent or more of the people are out of work - unemployed. Similar fears were expressed about extending the Food Stamp Program to Puerto Rico on a 100 percent state-like basis. Yet, the economy of Puerto Rico has greatly benefited from full state-like treatment under the U.S. Food Stamp Program from 1974 to the present, thus alleviating any genuine concerns on how higher welfare benefits would affect the economy. Since 1974 when the Food Stamp Program commenced, only a handful of people, in the first couple of years, have complained that people did not want to work.

The H.E.W. study which was cited by the Supreme Court opinion in *Torres* v. *Califano*, explicitly con-

cludes that neither political status, tax status, nor the effect on the economy should be considered as barrier to granting state-like treatment to U.S. citizens residing in Puerto Rico.

Contrary to appellant's position, appellees believe that the Federal District Court opinion gives considerable weight to these issues and devotes a very large part of its opinion precisely to them. We have no doubt that they weighed very heavily on the Court.

Appellant has again relied on *Califano* v. *Torres*, supra, to say that this Court concluded that the economic considerations which we have discussed here —tax status, cost of living, unemployment, impact on the economy, cost of the program— justified Congress' refusal to extend the Supplemental Security Income Program to Puerto Rico, and that such conclusions should be regarded also as dispositive of the controversy in the case of the Aid to Families with Dependent Children Program (AFDC).

As we have said previously, we do not believe that this Court in *Torres*, supra, ruled on all the issues presented in the case at bar. Furthermore, in *Molina* v. *Califano*, supra, the Circuit Court for the First Circuit, interpreting *Torres*, held that it was directed only to the question of the constitutional right to travel, and that even though the complaint raised the equal protection issue, it was not decided beyond question. All expressions as to what the district court "appartently acknowledged" should not be read as clearly foreclosing the equal protection issue. Reference to all the above considerations were made in footnotes 4 and 7 in *Torres*. Definitely we do not

believe that the Honorable Supreme Court of the United States dispatched such important questions for the people of Puerto Rico with such superficiality.

7. PRESUMPTION OF CONSTITUTIONALITY OF WELFARE LAWS

The appellant has also stated that all federal welfare and economic legislation such as the Social Security Act, are entitled to a strong presumption of constitutionality. *Mathews* v. *De Castro*, 429 U.S. 181, (1976). But what they fail to say is that the presumption is not irrebuttable and that it can be "rebutted" by showing, for instance, that the legislative judgement is invidious and not rational, *Elisa Molina Crespo* v. *Califano*, 583 F 2d. 572, p. 574. As we have contended through the course of this litigation we deeply believe that the appellant has not shown any rational basis for the distinction made by Congress in sections 1905 (b) and 1108 (a) of the Social Security Act regarding the operation of AFDC Program in Puerto Rico. Nor has the appellant advanced any showing of compelling state interest that would render this claim without merit. We are in accord with the District Court's opinion in that "it is inevitable to conclude that the formulas which have been created for Puerto Rico had the purpose to reduce the grant of federal money for the Commonwealth" (District Court's opinion, App. A p. 25). Appellees contend that the presumption of constitutionality have been rebutted.

8. THE DIFFERENT TREATMENT DOES NOT MEET THE RATIONAL BASIS TEST OF CONSTITUTIONALITY:

Appellees further contend that the different treatment does not meet the rational basis test of the Equal Protection Clause since it operates contrary to the purpose creating the AFDC Program.

The Aid to the Families with Dependent Children Program was created:

> "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives thus enabling each state to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such States, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents to attain or retain capability of the maximum self support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part (42 USC, Seccs. 601-610). The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Board, State plans for aid and services to needy families with children".

Federal money coming into the Island for the implementation of the Program is minimal compared

to the real necessity of the needy in P.R.[15] Based on need the people of Puerto Rico would be getting up to 83% in federal money. But since the difference was not established to "further the Purpose for which the Program was created" the reality is that the federal apportionment consists of only 50% of the twenty four million dollas ($24,000,000) ceiling.[16] Congressional policy deprives the residents of Puerto Rico from receiving much needed benefits to face the harsh realities of the Island. It is a well known fact that the financial problems facing the territories and possessions are more severe than the problems that are facing the states. Discriminatory treatment to these areas becomes then irrational, conceptually unsound, and purely arbitrary. It also deprives the people of the Island of Puerto Rico from participating in national wealth redistribution programs through which the wealth of the nation is equitably shared.[17]

CONCLUSION

The legal and consitutional validity of the present Congressional differential treatment has been

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[15] United States Department of Commerce statistics show that the per capita income in Puerto Rico is considerably less than half that in the United States and about half that of the poorest state.

[16] See Barbara O. Maffei, "Eligibility of Territories and Possesions in Federal Formula Assistance Programs", (Washington, D.C., Congressional Research Service, Library of Congress, at page 7, April 20, 1977).

[17] See on the subject, Richard B. Cappalli, "Excerpts from Discussion Paper on Testing Constitutionality of Discrimination Against Puerto Rico in Federal Aid Programs", (San Juan, Puerto Rico, Office of the Governor, September 54, 1975).

assessed by the now Secretary of the Department of Health, Education and Welfare, Patricia Roberts Harris, the appellant in the case at bar, in the following terms:

> "Whatever become the ultimate contour of United States-Puerto Rican citizenship, it is essential that nothing in the interest of the development of a particular political form be permitted to delay or limit the uniformity of treatment and rights which are coming to be part of United States citizenship."[18]

For the reasons stated herein, the appellees respectfully moves the Court to summarily affirm the judgement entered in the cause by the District Court for the District of Puerto Rico.

Respectfully submitted,

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[18] Patricia Roberts Harris, supra, at page 57.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-303

AWILDA SANTIAGO ROSARIO, GLADYS PEREZ CENTENO, CARMEN L. RIVERA BERRIOS, LUZ MARIA PAGAN ROJAS, LYDIA R. APONTE SEPULVEDA, FAUSTINO DIAZ LOPEZ, on behalf of themselves, their children, and all others similarly situated, PLAINTIFFS

vs.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, HONORABLE GENARO COLLAZO, Secretary of the Department of Social Services of Puerto Rico, their subordinates and agents in their individual and personal capacity, DEFENDANTS

OPINION AND ORDER

On several occasions in the history of this case, we have recited its legal nature. However, such recitations fall short in stating the import of the same. On its face, this case presents the question of the constitutionality of the formulas applicable to Puerto Rico and the ceiling established by Congress for determining the reimbursement to the Commonwealth of Puerto Rico for payments made to the United States citizens who reside in Puerto Rico under the Aid to the Families with Dependent Children Program ("AFDC"), as contained in Title 42, United States Code, Sections 1396(d)(b) and 1308(a). How-

ever, what is really at stake here is whether the United States citizens residents of Puerto Rico are entitled to the Equal Protection of the Laws as Guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

PROCEDURAL BACKGROUND

On March 9, 1977, plaintiffs filed this complaint against Joseph Califano, Secretary of the United States Department of Health, Education and Welfare, and Genaro Collazo, Secretary of the Puerto Rico Department of Social Services, challenging the AFDC formulas and ceilings applicable to Puerto Rico on the grounds that the formulas and ceilings violate plaintiffs' rights to travel and to equal protection of the laws.

On September 2, 1977, we issued an Order whereby this case was certified as a class action under Rule 23 of the Federal Rules of Civil Procedure. The plaintiff class was accordingly defined as "all United States citizens residing in the Commonwealth of Puerto Rico, which are recipients of public assistance under the Aid to the Families with Dependent Children category and that have been, are and will be discriminated [against] solely on the basis of their residence." At that moment we also ruled on codefendant Genaro Collazo's motion to dismiss and denied the same.

On May 16, 1978, defendant Joseph Califano, filed a motion for summary judgment seeking the dismissal of the complaint on the grounds (1) that under the ruling of the Supreme Court of the United States in *Califano* v. *Torres*, 435 U.S. 1 (February 2, 1978), the formulas and ceilings applicable to AFDC Reimbursements to Puerto Rico do not violate plaintiffs' right to travel and, (2) that the formulas and ceilings under consideration do not violate plaintiffs' rights to equal protection. In their opposition to this motion plaintiffs informed the Court that they would no longer pursue the right to travel claim in view of the holding of *Califano* v. *Torres*, *supra*, but that they opposed the rest of defendant's contentions on the grounds that there were material facts in dispute and that their rights to equal protection had indeed been violated.

On August 17, 1978, we denied the motion for summary judgment because there were material facts in dispute as evidenced by the parties' own statements contained in the Pretrial Order. We further ruled at that time that plaintiffs had standing to sue, and that the issues of fact precluded us from issuing judgment under Rule 56 and that the *Califano* v. *Torres* decision could not be read as squarely deciding the equal protection claim so as to lead us to conclude that under no set of facts could plaintiff succeed in their complaint.

Defendant Califano has now filed a motion to dismiss on the grounds that plaintiffs have failed to state a claim upon which relief could be granted. In support of the same it is alleged that the United

States citizens residing in Puerto Rico are not a suspect class and that the distinctions made by Congress are rationally related to a legitimate governmental interest and, therefore, there has been no violation of plaintiffs' rights under the Equal Protection Clause.

As a result of a Pretrial Conference held on April 23, 1979, the parties hereto filed a Final Pretrial Order approved by the Hon. Magistrate Juan M. Pérez Giménez and filed on April 26, 1979. In that Order the parties stipulated a statement of the statutory framework in which formulas for payments under the AFDC are determined. The part of the Pretrial Order titled "Formulas for Determining Payments Under AFDC" is incorporated hereto and made part of this Opinion.[1]

The parties also entered into several Stipulations, which are also contained in the Pretrial Order of April 26, 1979, and which are also made part of this Opinion as the Statement of Uncontested Facts.[2] We notice that defendant Califano declined to stipulate the statements contained in Part II of the section titled "Stipulations"; however, we agree with said defendant that those facts are not material to the legal issues presented by that same party's motion to dismiss.

Plaintiffs have filed a memorandum of law in opposition to defendant's motion to dismiss and in support of their contentions, and the matter stands now fully submitted for our consideration.

[1] See: Appendix I.

[2] See: Appendix II.

ANALYSIS

Plaintiffs allege that the differences in AFDC formulas between Puerto Rico and the fifty States and the ceiling on reimbursements applicable only to Puerto Rico violate the equal protection component of the Due Process Clause of the Fifth Amendment. Defendant alleges that in order to bring this claim the Court must first find that United States citizens residing in Puerto Rico are a suspect class and they argue that no such suspiciousness exist in the statute herein attacked.

To bolster his contention defendant has also alleged that there being no suspect class all the Court has to determine is whether such formulas and ceilings are related to a constitutionally permissible purpose and that in this case the statutory distinctions between Puerto Rico and the States are rationally related to a constitutionally permissible purpose. Such rationality is sought to be found on argument such as that Puerto Rico has a unique tax status because its residents do not pay Federal income taxes and that it has a large number of persons needing assistance and that, therefore, Congress made difficult policy decisions because it had to allocate limited funds, and it rationally determined that it must limit its financial liability for AFDC payments. We find that such arguments are speculatory in nature inas-

much as defendant himself admits that the legislative history is not clear as to why Puerto Rico was offered a different treatment under the Federal Welfare programs. Thus, we can not rely on the presumption of validity when no reasons are given for the differences, and suggestions and speculations as to the real reason for such differences can not substitute the need for a valid constitutional purpose in the enactment of the statutes here considered. Defendant has also alleged that Congress has plenary powers to make rules and regulations governing Puerto Rico.

In *Montalvo* v. *Colón*, 377 F. Supp. 1332 (1974), a three judge court tred the path of the evolution of the applicability of Federal constitutional principles to Puerto Rico, beginning with the Insular Cases, *Downes* v. *Bidwell*, 182 U.S. 244 (1901) and *Balzac* v. *Puerto Rico*, 258 U.S. 298 (1922), and concluded that such judicial meanders indicated "that the right to due process of law applies in such territories and indicate somewhat more generally that other fundamental rights . . . also apply." In *Montalvo*, the Court quoted from the decision of *Mora* v. *Mejía*, 206 F. 2d 377, 382 (1 CA, 1953):

> "No doubt under the Organic Act of 1917, . . . the insular government was subject to the due process clause of the Fifth Amendment . . . The government of the newly created Commonwealth of Puerto Rico is subject to the applicable provisions of the Constitution of the United States. That must mean that the people of Puerto Rico,

> who remain United States citizens, are entitled to invoke against the Commonwealth of Puerto Rico the protection of the fundamental guarantees of due process of law, as provided in the federal Constitution. For our present purpose it is unnecessary to determine whether it is the due process clause of the Fifth Amendment or that of the Fourteenth Amendment which is now applicable; the important point is that there can not exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." [3]

An argument could be had to the effect that the cases mentioned above are distinguishable in that they dealt with the applicability of the Federal Constitution as against the acts of the Commonwealth of Puerto Rico. In this case, the Federal Constitution, and more specifically, its equal protection component found in the Eighth [sic] Amendment, is being invoked against the Federal Government itself. Following this reasoning to its ultimate reach defendant would like us to hold that Congress has the power to determine which guarantees of the United States Constitution would extend to the Commonwealth of Puerto Rico, as a result of the exercise of congressional plenary power over the People of Puerto Rico under Article IV, Section 3 of the United States Con-

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[3] This Section was more recently quoted by the Supreme Court of the United States in *Calero Toledo* v. *Pearson Yatch Leasing Co.*, 416 U.S. 663 (1974).

stitution, said provision being widely known as the "Territorial Clause".

Defendant's "territorial contention" must fall for two reasons. First of all, even when the courts were operating under the impression that Puerto Rico was indeed a territory governed under said territorial clause, it was consistently held that the right to due process and other fundamental rights would apply as against the Federal Government. *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Balzac* v. *Puerto Rico*, 258 U.S. 298 (1922). See also: *Mora* v. *Mejía*, supra.

Even assuming, *arguendo*, that when enacting the Puerto Rico Federal Relations Act,[4], Congress was still wielding some sort of plenary power under the territorial clause, there is no doubt that the Privileges and Immunities clause of Article IV, Section 2, of the

[4] In 1917, Congress enacted a second Organic Act for Puerto Rico, known as the Jones Act, wherein Puerto Ricans were given the United States citizenship and more local self government.

As here pertinent, in 1950, Puerto Rico's Resident Commissioner introduced a bill in the 81st Congress. Said bill evolved into Public Law 600 of July 3, 1950. It stated in its first article, that "fully recognizing the principle of consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." It was further provided that it would become effective only if approved by the people of Puerto Rico, as well as by Congress. In a local referendum, Puerto Rico approved Public Law 600.

Public Law 600 provides that those sections of the Organic Act which defined the political, economic and fiscal relationship between Puerto Rico and the United States, would remain in force and would be thereafter known as the Puerto Rico Federal Relations Act.

Federal Constitution is applicable to the United States citizens residing in Puerto Rico. In said Federal Relations Act, it is specifically provided that:

> "The rights, privileges and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a state of the Union and subject to the provisions of paragraph 1 of section 2 of Article IV of the Constitution of the United States."

This privileges and immunities provision was the only part of the Bill of Rights in the Jones Act which was retained in the Federal Relations Act. This is at least indicative of the fact that the provisions therein contained attached, not to the nature of the political organization of the People of Puerto Rico—be it a Territory governed under the Territorial Clause, or a Commonwealth related to the United States "in the nature of a compact"—but that they were attributes accorded to the United States citizenship *itself*.

That the problem before us is not the political nature of the status of Puerto Rico but the essential nature of the United States citizenship for Puerto Ricans is something that was long ago recognized by the Court of Appeals for the First Circuit when it stated in *Mora* v. *Mejía*, supra, that ". . . the important point is that there can not exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." *Id.*

It should come as no surprise that we hold that the Fifth Amendment of the United States Constitution binds the Federal Government in its exercise of power over the residents of Puerto Rico and the United States citizens residing in Puerto Rico are protected by the principles of equal protection contained in the Fifth Amendment. *Reid* v. *Covert*, 354 U.S. 1 (1956); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schneider* v. *Rusk*, 377 U.S. 163 (1963). See: *Rodriquez Cintrón* v. *Richardson* (Civil No. 1099-72, D.C.P.R.) (Pesquera, J., April 7, 1975). See also: *Terry Torres* v. *Commonwealth of Puerto Rico*, —— U.S. —— (1979) 47 L.W. 4716 (June 18, 1979), wherein at least four Justices (Brennan, Stewart, Marshall and Blackmun, in a concurring opinion, state that the Fourth Amendment of the United States Constitution binds Congress in the exercise of power over residents of Puerto Rico regardless of the powers under the Territorial Clause. The case of *Reid* v. *Covert*, supra, was cited by the Justices for the proposition that the cases lending support for the doctrine of territorial powers of Congress should not be given "any further expansion".

The second reason why defendant's contention is not persuasive is that even in the event that it could be said that the equal protection component does not apply *ex propio vigore* to Puerto Rico, nevertheless, too much has been said in the area of fundamental rights which impede that we deny that an incursion must be made into the merits of this case.

As stated in plaintiffs' brief, the fundamental rights doctrine assumes that the rights guaranteed by the United States Constitution can be divided into two general groups. In *Downes* v. *Bidwell*, supra, said bifurcation was also assumed: two general groups—one which include those rights that are fundamental and essential to the proper protection of individuals before the government, which some jurists call "natural rights", and the other group, to which belong those rights that are peculiar to the Anglo-saxon system of procedure and which are deemed not essentially necessary to the proper protection of the individual. *Id.*

According to this theory Congress could not enact legislation in violation of fundamental rights because they are embodied in constitutional limitations which go to the very roots of the power of Congress to legislate. These limitations bind Congress notwithstanding the field and regardless of whether it deals with a territory—incorporated or not—or a State. In regard to the "non-fundamental rights", Congress would be bound by the limits they impose when enacting laws for the States and incorporated territories but would not be "trammeled" by them when legislating for the unincorporated territories.

It could be said that in light of the most recent judicial developments as to the doctrine of territoriality in Puerto Rico,[5], no attention should be longer

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[5] See *Terry Torres* v. *Commonwealth*, supra.

paid to the doctrine of fundamental rights. However, the same is still valid and pertinent when it is considered in its substantive, non-political, aspect: "The decision to treat a right as fundamental for equal protection purposes may be influenced by, and may even represent a surrogate for, a concern that allowing government to exercise centralized, discretionary choice with respect to the right will invite prejudiced action oppressing powerless or despised minorities." Tribe, *American Constitutional Law,* Sections 16-12 (Foundation Press, 1978). When so posed, the issue presents the vitality of the very fabric of the constitutional organization of the Nation and of its government vis-a-vis its individual citizens.

Such reveries of the political scientist aside, it is necessary that we indulge for a minute in the applicability of the fundamental rights doctrine to this case in view of the statement of the Court of Appeals for the First Circuit in the case of *Elisa Molina Crespo* v. *Califano*, 583 F. 2d 572, (September 22, 1978). In that case the appellate court reversed a dismissal by the district court of an equal protection claim very similar to the present one. Said dismissal had been based on the decision by the Supreme Court of *Califano* v. *Torres*, supra, which, as we have mentioned before, hinged on a right to travel claim. In remanding the case for the consideration of the equal protection claim, the Court stated:

> "In sum, though *Torres* may be strong authority for the proposition that there is no violation of equal protection in this case, it is not dispositive. It may render this claim of *doubtful* merit, but it does not inescapably render the claim frivolous. Therefore, we must vacate the district court's judgment and remand for further proceedings. In so doing, we do not rule out the possibility of a later dismissal for failure to state a claim or upon summary judgment. *It seems scarcely likely that the legislative judgment will turn out not to have been rational in this situation.* But we can not affirm the order in its present procedural posture." (Emphasis ours). *Id.*, 574.

As it was to be expected from any able litigant, defendant Califano invokes this portion of the Appeals Court's opinion as providing "strong authority" for the proposition that there is no violation of equal protection in this case. With due deference for the Appeals Court we can not take that language for more than what it actually is, *obiter dicta*, and we must therefore consider the matter.

Does this case present a fundamental right's question? What is the fundamental right here at stake which would compel us to subject the statutes here attacked to a strict scrutiny? This Court is of the opinion that even plaintiffs themselves fail to properly focus the fundamental right in question. Certainly, there is no fundamental right to receive *more* welfare aid. For it is quite settled that no such *fundamental* right to welfare aid exist under the Constitution of the United States. *San Antonio Independent School District* v. *Rodríquez*, 411 U.S. 1 (1973); *Dandridge* v. *William*, 397 U.S. 471 (1970);

Richardson v. *Belcher*, 404 U.S. 78 (1971). However, once Congress has decided to grant the United States citizens certain rights then the exclusion of some of those citizens from enjoying those rights must be treated with suspicion not because the statutory right is fundamental but because it is fundamental that United States citizens be accorded the equal protection of the laws unless a compelling state interest otherwise so dictate. Thus, it is the guarantee of equal protection that is in itself the fundamental right involved.

In the case of *Acevedo Montalvo*, supra, this Court stated:

> ". . . we think that we may safely assume that when a personal right has been found applicable to the states via the Fourteenth Amendment, we may then assume that such right is applicable to Puerto Rico, regardless of the theoretical means used to achieve such a result. *After all, citizens of Puerto Rico, in common with citizens of states, are citizens of the United States.* In addition, historically, when fundamental rights are involved, courts have been hesitant to find the protection of the United States Constitution lacking, and this is no less true since the advent of the Commonwealth . . ." (Emphasis ours).

Even though the cases cited above involve the applicability of the Federal Constitution against the Commonwealth Government, we think that the same holds true for the Congress of the United States in regard to United States citizens residents of Puerto

Rico. "It would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling* v. *Sharpe*, supra, at 499.

We now hold that the exclusion of the United States citizens residing in Puerto Rico caused by the statutes herein attacked create a "Suspect Class" which invites the Strict Scrutiny Test in search for a Compelling State Interest. We further hold that their exclusion from the protection of the laws intended to benefit indigent United States citizens creates a suspect classification which does not stand such strict constitutional scrutiny in absence of a compelling valid state interest.

SUSPECT CLASS

The United States citizens residing in Puerto Rico, considered as a class, have the "indicia of suspectness" necessary to invoke the strict scrutiny test and qualify as an example of a "discrete and insular minority" for whom a heightened judicial solicitude is appropriate. See *Graham* v. *Richardson*, 430 U.S. 371, 375 (1971). Said class meets the three traditional indicia of suspectness established by the Supreme Court: the class disabilities, the history of purposeful unequal treatment and the position of political powerlessness. *San Antonio Independent School District* v. *Rodríguez Cintrón* v. *Richardson*, supra, this Court entered at length into the reasons why such a class present the standards of suspectness:

> "Although the residents of Puerto Rico were granted full citizenship in 1917, their political

condition within the American system of government can hardly be considered equal. In spite of the fact that the Commonwealth has obtained a large measure of self government and its own constitution, see *Calero Toledo* v. *Pearson Yatch Leasing Co.*, supra, with respect to the acts of the Federal Government, executive or legislative United States citizens residing there are completely disenfranchised. In *San Antonio Independent School District*, supra, the Supreme Court defined a suspect class as one saddled with such disabilities or subjected to a history of unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. 411 U.S. at 28. With regard to federal legislation which is generally applicable to Puerto Rico, the residents of the Commonwealth are completely powerless and are in a position similar to that of the District of Columbia. *United States* v. *Thompson*, 452 F. 2d 1333 (1971), Cert. denied, 405 U.S. 1075 (1972). There, the United States Court of Appeals for the District of Columbia Circuit, stated at page 1340.

> "What is involved here is not just any arbitrary classification between two similarly situated groups. The residents of Washington occupy a profoundly anomalous position in the federal system, and any classification which discriminates against them is particularly suspect. Writing for the Court in Reynolds v. Sims, supra, Chief Justice Warren observed: 'The right to vote freely for the candidate of one's choice is

> of the essence of a democratic society, and any restrictions on that "right strike at the heart of representative government.' But for the residents of the District, the right to vote in congressional elections is not merely restricted—it is totally denied.
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> . . .
>
> Although the courts have a vital role to play in preserving our constitutional rights, we normally depend upon the vote as 'preservative of other basic civil and political rights.' Minorities can usually protect themselves by playing their role in the political process and forming coalitions with other groups to secure a majority. But it is senseless to remit District residents to the political process, since for them there is no political process. The principle of majority rule loses its legitimacy when not all the votes are counted. See Developments in the Law—Equal Protection, 82 Harv. L.Rev. 1065, 1124-1126 & n.275 (1969). In this context, at least, the normal arguments for judicial restraint become no more than hollow shibboleths grotesquely detached from the logic which once supported them. There is no reason to pay deference to the views of a representative body which does not in fact represent those against whom it is discriminating. Therefore, discriminatory classifications affecting District residents must be subjected to the strictest possible review."

The Court had also said at page 1139:

> ". . . when Congress decides to enact national legislation, the situation is fundamen-

> tally different. The passage of such a law implies a threshold decision to override regional difference in favor of a uniform standard that will govern the entire country. If one small isolated group is then excluded from the operational effect of the statute, the rationality of that exclusion is highly suspect."

Defendant contends that the exclusion was not intended to apply to residents of Puerto Rico as a class, as it also excludes those from Virgin Islands, Guam, American Samoa and that residents of Puerto Rico would not be excluded from the benefit should they live in the fifty states or the District of Columbia. Defendant argues that the classification is based on geography and not to discriminate against American citizens who reside in Puerto Rico. This reasoning we must reject as fallacious. The simple fact that in order to receive the benefits American citizens residing in Puerto Rico would have to move out to the fifty states or the District of Columbia is tantamount to discriminatory treatment. Although the exclusion applied is designed in terms of geographical exclusion, the effect of the exclusion is on the American citizens who are residents of Puerto Rico.

Defendant further argues that as Puerto Rico is not a state, its residents cannot demand all of the rights and privileges afforded to the residents of the United States, specially when they are not subject to the payment of Federal income taxes. It is the contention of defendant that Congress can limit the grant of benefits to the residents of the fifty states and the District of Columbia

in order to balance the payment of those benefits against taxes imposed on them. It is further claimed that the extension of the benefits granted under Section 228 of the Act to the citizens who reside in Puerto Rico would have to be almost totally financed by non-resident citizens, thereby resulting in a gratuity to the residents of Puerto Rico.

We fail to find in such arguments either a compelling state interest or even a rational relation to the purpose of the statute.

The concern of Congress for the cost of the program cannot justify an invidious discrimination. In *Shapiro* v. *Thompson*, supra, the Supreme Court said:

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellant must do more than show that denying welfare benefits to non residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification." 394 U.S. at 633.

The same concern for fiscal integrity was rejected in *Graham* v. *Richardson*, 403 U.S. 371 (1971) and in *Morton, Secretary of the Interior*

v. *Ruiz*, 415 U.S. 199 (1974). In the latter case, the Supreme Court said:

> "Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." 415 U.S. at 231.

The given fact that the residents of Puerto Rico are not generally liable to pay Federal income taxes does not afford the missing compelling state interest nor does it present a rational relation to the purposes to be accomplished by the statute.

Given the purpose of Section 228 to create a national program of some basic economic aid to elderly American citizens who had been left out of the Social Security system, to exclude a considerable number of otherwise qualified American citizens will not rationally advance the purpose of the statute. Such exclusion does not appear to be imperative or compelling. Residents of Puerto Rico have been a part of the social security system since 1950 and have contributed

to the system in the same manner that the residents of the fifty states and the District of Columbia. Puerto Rico too has elderly residents who have been left out of the social security system.[6] And the elderly of Puerto Rico are not immune from the affliction of poverty in old age.[7]

"[6] According to the census of 1970, there were around 28,368 persons who had reached seventy two before 1968. This group included 13,354 males and 14,512 females. See General Population Characteristics, Puerto Rico, 1970, U.S. Department of Commerce, P.C. (1), P. 53, PRP 5352, 53.

[7] The impact of inflation has been especially severe on Puerto Rico because of its geography, the nature and stage of development of its economy. Having an area of only 3,435 square miles, a population density of over 850 persons per square mile, with limited agricultural land and few indigenous raw materials, Puerto Rico imports the bulk of its basic commodities. Basic commodity shortages, both real and artificial, have been the root cause of the present worldwide inflation. Puerto Rico imports most of its commodities from the United States. Their prices in Puerto Rico have been further inflated by the 47 per cent increase in ocean freight rates granted to carriers during the past two years.

Everywhere, the poor are hardest hit by inflation and economic stagnation. More of their income is spent for the basic foods and they are the first to lose their jobs and the last to be reemployed. In Puerto Rico, per capita personal income is currently only one-third the U.S. average and the 1970 census showed that 60 per cent of all Puerto Rican families were below the U.S. 'poverty threshold'. During fiscal year 1974, the island experienced an average inflation rate of 12.6 per cent. However, during the first semester of calendar 1974, the average increase in prices was over 13 per cent. Infla-

The fact that Congress has not extended the internal revenue laws to Puerto Rico and therefore exempts Puerto Rican residents generally from the payment of Federal income taxes does not supply any valid justification compelling or otherwise. For the situation is like that presented in *Shapiro* v. *Thompson*, supra, where the Supreme Court stated:

> "Appellants' reasoning would logically permit the state to bar new residents from schools, parks and libraries or deprive them of police or fire protection. Indeed it would permit the state to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportion of state services." 394 U.S. at 632.

It concluded that the limitation of welfare benefits to those regarded as contributing to the state was not a constitutionally permissible state objective.

We may add that to take the fact of nonpayment of taxes into consideration for the purposes of validating the exclusion of antithetical to the moral and constitutional principles upon which our nation is based and repugnant to the idea of equality of all its citizens. American citizens residents of Puerto Rico may be called into the

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tion has been particularly severe in the case of imported foodstuffs.

Commonwealth Government Report, *Inflation and the Economy of Puerto Rico*, submitted for consideration at President Ford's economic summit meeting in Washington, September 27, 1974."

Armed Forces and have given many lives in the defense of the nation. They have migrated through and lived in many states, working in the several states and contributing to the growth and culture of the nation. See *Graham* v. *Richardson*, supra. It has been said by a scholar in the matter:

> "Realistically reviewed, Puerto Rico, both before and after the Commonwealth, has long been integrated into the network of national legislation and national economic relationships. With the exception of Federal tax laws, the Interstate Commerce Act and a few federal statutes of lesser significance, almost all national legislation applies to Puerto Rico. Similarly, almost everything Puerto Rico sells and practically everything which is purchased from outside the Island, is to and with the United States national economy." Helfeld, *How Much of the Federal Constitution is Likely to be Held Applicable to Puerto Rico?*, 39 Revista Jurídica de la Universidad de Puerto Rico 169 n. 88 (1970).

The United States of America is more than anything a community of American citizens and not merely a conglomerate of geographical entities. All the citizens of a community are entitled to equal and full citizenship. As clearly stated in *Schneider* v. *Rusk*, 377 U.S. 163 (1964).

> ". . . while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' Bolling v. Sharpe,

> 347 U.S. 497, 499. . . . The discrimination addressed at naturalized citizens "drastically limits their rights to live and work abroad in a way other citizens may. It creates indeed a second class citizenship."

The proposition of a second class citizenship was early rejected by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):

> "For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizens of the United States; . . ."

We would not be acting in the best tradition of American jurisprudence if we tried to justify or rationalize something that is repellent to the judicial instinct of equality and justice for all."

We have quoted at length from this Court's Opinion in the case of *Rodríguez Cintrón*, because we find the same dispositive of most of defendant's contentions in this case. The same is fully reiterated by the undersigned judge and is made part of this opinion.

We can not see how the Program of Aid to the Families with Dependent Children can be held to be different in nature from the programs for economic aid to elderly American citizens considered in *Rodríguez Cintrón*, supra.

The AFDC Program was created:

> "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents to attain or retain capability for the maximum self support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Board, State plans for aid and services to needy families with children."

The AFDC legislation was enacted by Congress in 1935. It was extended to Puerto Rico in 1950 with the ceiling restriction and the establishment of a different formula to allocate the federal funds to carry out the Program in Puerto Rico. It is inevitable to conclude that the formulas which have been created for Puerto Rico had the purpose to reduce the grant of federal money for the Commonwealth. As stated by defendant himself and hinted by the Supreme Court of the United States in a footnote in *Torres* v. *Califano*,[6] the idea behind the distinction is the

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[6] The *Torres* Court commented at Footnote 4:

"The complaint had also relied on the equal protection component of the Due Process Clause of the Fifth Amendment in attacking the exclusion of Puerto Rico from the SSI program. Acceptance of that claim would have meant that all

cost of implementing the Program in its full capacity in accordance with the economic situation of the residents of Puerto Rico. In fact, in one portion of defendant's brief it is specifically put forth that "Congress rationally determined that it must limit its financial liability for AFDC payments." Thus, in all lights the *only* real reason for the difference is an economic one.

In *Rodríguez Cintrón*, supra, we rejected the idea that economic concern for the cost of a program could justify an individious discrimination between United States citizens residing in the States and those residing in Puerto Rico. See also: *Shapiro* v. *Thompson*, supra; *Graham* v. *Richardson*, supra; *Morton* v. *Ruiz*, 415 U.S. 199 (1974); *Palmer* v. *Thompson*, 403 U.S. 217; *Schilb* v. *Kuebel*, 404 U.S. 356; *James* v. *Strange*, 407 U.S. 128.

If it is true, as stated in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976), that the Federal Government, like the States, must govern impartially, the concept of equal protection of the law being a component of the Fifth Amendment's guarantee of due process, as well as by the equal protection clause of the Fourteenth Amendment, then it is obvious that

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otherwise qualified persons in Puerto Rico are entitled to SSI benefits, not just those who received such benefits before moving to Puerto Rico. But the District Court apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it. Puerto Rico has a relationship to the United States "that has no parallel in our history." *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 596 (1976). *Cf. Balzac* v. *Puerto Rico*, 258 U.S. 298 (1922); *Dorr* v. *United States*, 195 U.S. 138 (1904); *Downes* v. *Bidwell*, 182 U.S. 244 (1901).

congressional concern for fiscal integrity cannot be achieved by excluding United States citizens residing in Puerto Rico from the benefits available to the rest of the United States citizens in the Nation.

In view of all of the above, we consider that the formulas applicable to Puerto Rico and the ceiling established by Congress for determining the reimbursement to the Commonwealth of Puerto Rico for payments made to United States citizens who reside in Puerto Rico under the Aid to the Families with Dependent Children Program, as contained in Title 42, United States Code, Sections 1396(d)(b) and 1308(a), are unconstitutional because they create an arbitrary and invidious distinction against a suspect class, the United States citizens residing in Puerto Rico, and infringe on their fundamental right to equal treatment, thereby violating the Equal Protection Guarantee included in the Due Process Clause of the Fifth Amendment to the United States Constitution.

Therefore, defendant Califano's motion to dismiss, must be denied. Partial summary judgment shall be entered in plaintiffs' favor declaring Sections 1396(d)(b)(2) and 1308, unconstitutional. There being no just reason for delay, partial judgment shall be entered by the Clerk.

It is further provided that a Status Conference be held before the Honorable Magistrate Juan M. Pérez Giménez. At that conference, the parties are to delineate any further proceedings necessary for the

completion of this case and the solution of any non-declaratory claims left pending by this opinion.

IT IS SO ORDERED.

San Juan, Puerto Rico, October 1st, 1979.

/s/ Jose V. Toledo
JOSE V. TOLEDO
Chief Judge
U.S. District Court

APPENDIX I

FORMULAS FOR DETERMINING PAYMENTS UNDER AFDC

I. Description of the Formulas for Determining Payments Under AFDC; Their Operation and Applicability to the United States and Puerto Rico from 1972-1978.

A. *In the United States*

1. There are two possible formulas for determining reimbursement from the federal government to states for payments the states make under AFDC. The first is contained in the AFDC statute, 42 U.S.C., Section 603(a). The alternate formula is authorized by 42 U.S.C., Section 1318, which allows use of the Federal Medical Assistance formula which is contained at 42 U.S.C., Section 1396d(b).

2. Participation in the AFDC program is voluntary. If a State decides to participate, it is required by the Social Security Act, 42 U.S.C., Section 602(a) and the regulations pursuant to it, 45 CFR 233.20 (a)(2) and 45 CFR 233.10, to determine the standard of need which is the amount of money the state establishes is necessary to meet their basic living requirements. Pursuant to 45 CFR, Section 233.10, the state must determine a payment standard which is the amount against which income is applied. This amount is equal to or less than the need standard. The State must then determine what percentage of the need standard it wishes to reimburse. Therefore,

payments throughout the States vary greatly. The federal formula (either the formula contained in 42 U.S.C., Section 603(a), or the formula contained in 42 U.S.C., Section 1396(b)), is then applied as a reimbursement to the State funding. There is no federal reimbursement to the States.

3. The formula contained in the AFDC statute, 42 U.S.C., Section 603(a), provides for payments consisting of:

(a) 5/6 of the state expenditures up to $18 times the total number of recipients, plus

(b) the "Federal percentage" of the amount by which the State expenditures exceed $18 times the total number of recipients up to $32 times the total number of recipients; plus

(c) $100 times the total number of recipients of foster care.

4. The "Federal percentage" described in 3(b) above, is defined at 42 U.S.C., Section 1301(a)(8). The Federal percentage is 100% minus the state percentage which is a percentage which bears the same ratio to 50% as the square of the per capita income of the United States. The Federal percentage must fall between 50 percent and 65 percent.

5. Under the alternate formula described in 42 U.S.C., Section 1396d(b), states are paid the percentage that is 100% less the State percentage which is a percentage that bears the same ratio to 45% as the square of the per capita income of the state bears to the square of the per capita income of the United

States. This Federal Medical assistance percentage must be between 50% and 83%. In fiscal year 1975, federal reimbursement under this formula ranged from 50% in New York to 78.28 percent in Mississippi.

6. States have an opportunity to choose which of the two formulas they would like to use.

B. *In Puerto Rico* (1972-1978)

1. There are two possible formulas for determining reimbursement to the Commonwealth of Puerto Rico for payments to United States citizens residing in Puerto Rico under AFDC. The first is contained in 42 U.S.C., Section 603(a)(2). The alternate formula is authorized by 42 U.S.C., Section 1318, which allows use of the Federal Medical Assistance formula which is contained at 42 U.S.C., Section 1396(d)(b)(2). The alternate formulate in its subsection (2) specifically states that the Federal Medical Assistance Percentage for Puerto Rico, Guam, and the Virgin Islands, shall be 50 per centum.

2. Puerto Rico is required to establish a standard of need which is the amount of money recognized by the state as the level required monthly for meeting the basic needs for a family of a specific size. It then determines a payment standard which is the amount of money from which is deducted the income available for basic needs to determine the amount of AFDC payment for a family of a specific size. The payment standard may be equal to or less than the need standard. In Puerto Rico the need standard and the payment standard are the same. Puerto Rico funds forty-

three per cent (43%) of the need standard. The federal formula is then applied as a reimbursement to Puerto Rico's funding.

3. Under the formula contained in the AFDC statute, 42 U.S.C., Section 603(a)(2), the Federal Government will pay one half (½) of the expenditures in Puerto Rico up to $18 times the total number of recipients.

4. Under the alternate formula described in 42 U.S.C., Section 1396d(b)(2), the Federal Government will pay 50% of all expenditures. There is no $18 per recipient limit.

5. Puerto Rico uses the alternate formula described in 42 U.S.C., Section 1396 (b)(2).

6. In addition, pursuant to 42 U.S.C., Section 1308, there was a Twenty-four million dollars (24,000,000) ceiling for 1972 and all years thereafter through 1978 for total Federal dollars expended in Puerto Rico under Titles I, X, XIV, XVI, and IV-A of the Social Security Act. The amount of money for planning services under IV-A could not exceed Two million dollars ($2,000,000) and the amount under Title XIX (Medicaid) could not exceed Thirty million dollars ($30,000,000).

The fifty states and the District of Columbia do not have ceilings on the federal financial reimbursement under AFDC and Medicaid.

C. *In Puerto Rico*

(Formulas and Ceilings for 1979).

Public Law 95-600, which was signed into law by the President of the United States on November 6,

1978, introduced a change in the public assistance matching formula for Puerto Rico for fiscal year 1979, in which the 50-50 matching rate was changed to 25% (state share)—75% (federal share) and the ceiling was also raised to $72,000,000 (seventy-two million dollars). Public Law 95-600 does not provide for a change for any other year.

Title VIII—Amendments Relating to the Social Security Act

Sec. 802—CHANGE IN PUBLIC ASSISTANCE MATCHING FORMULA AND INCREASE IN AMOUNT OF PUBLIC ASSISTANCE DOLLAR LIMITATIONS, FOR PUERTO RICO, THE VIRGIN ISLANDS, AND GUAM IN FISCAL YEAR 1979.

(a) PUBLIC ASSISTANCE MATCHING FORMULA—Section 1118 of the Social Security Act is amended by adding at the end thereof the following new sentence: "For purposes of the preceding sentence, the term 'Federal Medical Assistance Percentage' shall, in the case of Puerto Rico, the Virgin Islands, and Guam, mean seventy-five per centum when applied to quarters in the fiscal year ending September 30, 1979."

(b) DOLLAR LIMITATIONS—Subsection (a) of Section 1108 of such Act is amended.
(1) in paragraph 1—

(A) by striking out "or" at the end of clause (D),

(B) by striking out the semicolon at the end of clause (E) and insert-

ing in lieu thereof "other than the fiscal year 1979, or" and

(C) by adding at the end thereof the following new subparagraph,

(D) "$72,000,000 with respect to the fiscal year 1979,"

(2) in paragraph (2)—

(A) by striking out "or" at the end of clause (D),

(B) by striking out "and" at the end of Clause (E), and inserting in lieu thereof "other than fiscal year 1979 or" and,

(C) by adding at the end thereof the following new subparagraph,

(D) $2,400,000 with respect to fiscal year 1979," and

(3) in paragraph (3)—

(A) by striking out "or" at the end of clause (D)

(B) by striking out the period at the end of clause (E) and inserting in lieu thereof "other than the fiscal year 1979", and

(C) by adding at the end thereof the following new subparagraph:

(D) "$3,300,000 with respect to fiscal year 1979."

Approved November 6, 1978."

APPENDIX II

STIPULATIONS

I. STIPULATIONS BY AND BETWEEN PLAINTIFFS AND CO-DEFENDANTS JENARO COLLAZO AND JOSEPH A. CALIFANO

(1) That the basic needs for AFDC recipients for Puerto Rico were updated in 1969.

(2) That payments in Puerto Rico presently cover forty-three percent (43%) of the basic needs. A proposal by the State Agency is presently pending before HEW which if approved would cover additional special needs for fiscal year 1979.

(3) Puerto Rico receives a different treatment than the States from the Federal Government in the financing of the Aid to the Families with Dependent Children (AFDC) Program.

(4) That the Public Assistance Program up to September, 1978, was limited by the twenty-four million dollar ($24,000,000) ceiling imposed on Puerto Rico and by the 50-50 matching formula established by the provisions of the Social Security Act.

(5) The AFDC was created by the United States Congress in 1935 to benefit the needy persons living in the United States and extended to Puerto Rico during the year 1950 with the limitations imposed by law and regulations.

(6) In 1972, Puerto Rico had a federal grant with a strict ceiling which was set at twenty-six million dollars ($26,000,000) distributed as follows:

a. $24,000,000 authorized under Title IV-A

b. $2,000,000 authorized under Title IV-C

(7) Puerto Rico has a lower per capita income than the fifty states under a grant with a ceiling and a fifty percent (50%) federal match up to the year 1978. New York, which has one of the highest per capita income in the United States, also has a fifty percent federal match and has no ceiling. For fiscal year 1979, the matching formula for Puerto Rico was changed to seventy-five percent (75%) federal share and twenty-five percent (25%) state share.

(8) The poorest states in the United States may receive as high as an eighty three percent (83%) federal match for their AFDC Program.

STIPULATIONS CONCERNING INDIVIDUAL CIRCUMSTANCES OF THE PLAINTIFFS:

Co-plaintiff Faustino Diaz Lopez

(9) Faustino Diaz Lopez resides in Las Gardenias Public Housing Project in Bayamón, Puerto Rico.

(10) His family is composed of five persons, including himself. He is the head of the household.

(11) a. Plaintiff Faustino Diaz López is forty four (44) years old.

b. Carmen Mercado is plaintiff's wife; thirty eight (38) years of age.

c. Wanda Ivette Diaz is plaintiff's daughter; seventeen (17) years of age.

d. Carmen Delia Diaz Mercado is plaintiffs' daughter; sixteen (16) years of age.

e. Jacqueline Diaz Mercado is plaintiff's daughter; fifteen (15) years of age.

(12) Plaintiff's household income consists of $30-$33 weekly, which he earns working as a public bus driver, and thirty nine dollars and twenty five cents ($39.25) of economic assistance under the AFDC Program which they receive from the Department of Social Services of the Commonwealth of Puerto Rico.

(13) According to medical evidence in the client's record in the possession of the Department of Social Services, he suffers from organic heart disease, arteriosclerotic heart disease, and acute arteroilateral myocardial infarction.

Co-plaintiff Carmen L. Rivera Berrios

(14) Carmen L. Rivera Berrios, thirty two (32) years old, resides with her son, Santiago, eleven years old, in the squatters community called Villa Marisol, in Toa Baja, Puerto Rico.

(15) Plaintiff's husband died in the year 1970. The cause of his death was determined to be "death by asphyxiation". He drowned in a river.

(16) Their permanent income consists of twenty six dollars and twenty five cents ($26.25) from the Department of Social Services under the Aid to the Families with Dependent Children Program (AFDC).

Co-plaintiff Luz María Pagan

(17) Luz María Pagán is a widow and the mother of five children who used to live with her in Bayamón, Puerto Rico, until the month of November of 1978.

(18) Plaintiff informed the Bayamon local office of the Department of Social Services of her intention to leave the Island to go to the United States on November 9, 1978.

(19) She stated that she was to leave the Island because she was going to take one of her sons, Jose Alberto, to the United States for medical treatment of his eye condition.

(2) The household was receiving at that time seventy one dollars and seventy five cents ($71.75) from the Aid to the Families with Dependent Children (AFDC) Program.

ADDITIONAL STIPULATION BETWEEN ALL THE PARTIES:

(21) That plaintiffs waive their prayer for relief for damages contained in paragraph 62 of the complaint.

(22) That the plaintiffs limit their action to claims under the AFDC Program.

(23) That as to the Federal defendants, their claims under Title VI of the Civil Rights Act of 1964, are inapplicable.

(24) That the allegations contained in paragraph 57 are for argumentation purposes and no relief is sought.

(26) That plaintiffs waive their allegations contained in paragraph 56 and all claims for relief based on allegations that their constitutional rights to travel have been infringed upon.

II. STIPULATIONS BY AND BETWEEN PLAINTIFFS AND CODEFENDANT JENARO COLLAZO. (Codefendant Joseph A. Califano takes exception to these statements and/or stipulations

(1) For fiscal year of 1976, based on 1969 standards, the Department of Social Services, considering the current cost of living, was only providing on or around twenty-three percent (23%) of the minimum needs to eligible persons.

(2) Section 1108 of the Social Security Law should be amended.

(3) The Social Security Act, 42 U.S.C. 601, et seq., assured the states federal reimbursement from an open ended grant for part of the cost of assistance, payments, services, staff and administration.

(4) The federal match is based on the per capita income of the state, so that New York receives a fifty percent (50%) federal participation while Mississippi receives around 80.1 percent in federal economic assistance funds.

(5) Puerto Rico's standard payment of nine dollars and forty cents ($9.40) toward the minimum necessities of a child who is in the AFDC Program meets only 23.5 percent of the June 1976 standard.

(6) To increase the federal allocation by itself would not help the Puerto Rican poor in the short run, unless the formula of 50-50 matching is changed.

(7) Puerto Rico does not have the resources to increase its state apportionment at the same rate it would have to increase it if the federal participation increases but the 50-50 matching rate stays.

(8) The Governor of Puerto Rico has stated before the United States Congress on several occasions that he would recommend to the Puerto Rican Legislature to appropriate additional funds for the implementation of the Aid to the Families with Dependent Children Program.

(9) The Governor of Puerto Rico, Honorable Carlos Romero Barceló, the Resident Commissioner, Honorable Baltasar Corrada del Río, and Codefendant Honorable Jenaro Collazo, Secretary of the Department of Social Services of the Commonwealth of Puerto Rico, have appeared on various occasions before the Congress of the United States denunciating the differential and unequal treatment awarded to Puerto Rico in the allocation of federal funds for the implementation of the provisions of Title IV A of the Social Security Act, which includes the Aid to the Families with Dependent Children Program and demanding statelike treatment for the United States citizens residing in Puerto Rico, which as the present time are being unfairly treated under several of the public assistance titles of the Social Security Act.

(10) Since public assistance programs are thus designed for the benefit of people who are not usually taxpayers, making benefits contingent upon the payment of taxes would contradict the very purpose and public policy behind the legislation.

(11) The differential funding formulas applied to Puerto Rico have resulted in Island beneficiaries receiving only a fraction of what their counterparts in the United States are entitled to.

(12) The average Puerto Rican is getting only forty seven dollars ($47.00) per family for AFDC, which is less than one fourth of the United States average, which is one hundred and eighty seven dollars ($187.00) per family and this share goes down to one tenth in the case of some programs.

(13) On May 2, 1977, codefendant Honorable Jenaro Collazo, as head of the Department of Social Services of the Commonwealth of Puerto Rico, appeared with the Honorable Baltazar Corrado del Río, Resident Commissioner in Washington, before the Sub-Committee on Public Assistance of the Committee on Ways and Means of the Congress of the United States.

(14) In the joint appearance of May 2, 1977, before the Sub-Committe of Public Assistance of the Ways and Means Committee, the following was stated by Honorable Baltasar Corrada del Río: that severe poverty and high unemployment have generated extensive public assistance needs in Puerto Rico.

(15) It was also said that, "while our needs are big and resources very limited, we have not been fortunate in receiving appropriate treatment under various sections of the Social Security Act.

(16) "According to the matching formula used for the fifty (50) states, which takes into consideration their per capita income for assistance programs, contrary to the 50-50 matching rate formula applied to Puerto Rico, Mississippi receives eighty seven dollars ($87.00) for every twenty five dollars ($25.00). In comparison, Puerto Rico with a lower per capita in-

come than Mississippi and New Jersey, is only granted fifty dollars ($50.00) locally apportioned."

(17) "the facts are that our local funds are limited because of lack of resources even though local taxes in Puerto Rico are exceedingly high."

(18) The Committee on Ways and Means of the Congress of the United States recommended that the ceilings be lifted but retaining the 50-50 matching requirement.

(19) Codefendant Honorable Jenaro Collazo supported the position expressed by Honorable Baltasar Corrada del Rio, Resident Commissioner of the Commonwealth of Puerto Rico, in his testimony to the Ways and Means Committee in 1977 regarding the proposed recommendations of the Ways and Means Committee of the United States Congress to the effect that the ceiling be lifted but the 50-50 matching formula remained. Codefendant believes that the meassure would produce almost no relief to Puerto Rico since Puerto Rico would have to match an additional twenty seven million dollars ($27,000,000) in order to be eligible to receive the fifty two million dollars ($52,000,000) estimated by the Committee at that time.

(20) Codefendant Jenaro Collazo supports the position of the Resident Commissioner, Honorable Corrada del Rio, that in addition to lifting the ceilings, the matching ratio should be set at three to one, so that Puerto Rico can make full use of the funds included in the budget recommendations.

(21) Codefendant Honorable Collazo, as Secretary of the Department of Social Services, supports and shares all that was stated by the Resident Commissioner, Honorable Corrada del Rio, in his formal presentation of May 2, 1977, before the Ways and Means Committee of the United States Congress.

(22) The Commonwealth of Puerto Rico can only meet 23.5%, that is, nine dollars and forty cents ($9.40) of the children's minimum necessities, and 24% which represent thirteen dollars and sixty cents ($13.60) of the adult's Minimum necessities, based on the June 1976 Consumer Price Index Updated Standards.

(23) Codefendant Honorable Jenaro Collazo shares the position that all United States citizens, regardless of their place of residence, should share equally in those programs which are aimed at improving their existence. The limits placed on the American citizens in Puerto Rico, Guam, and the Virgin Islands are unconscionable and should be removed.

(24) The double burden of limited funds and regulatory requirements means that Puerto Rico must direct an increasing share of its resources to meeting the costs imposed by separate management information systems, cost accounting systems, and even, in some cases, separate service delivery systems.

(25) This rechanneling of resources has important opportunity costs, since monies used to set up the bureaucratic apparatus required by the Federal Government could otherwise be used in actual services.

(26) The compliance with administrative actions thus occurs at the expense of the provisions of benefits.

(27) Given the inequities of the funding process and the problems of program administration, it is not surprising to find that public assistance efforts in Puerto Rico produce little in terms of outcome.

(28) Underfunding generally results in a dilution of efforts and in the frustration of the objectives of the legislation that created the AFDC Program.

(29) The imposition of a statutory ceiling on the federal contribution means that the real monies available tend to decline over time as the population rises, inflation increases, and administrative requirements are imposed.

(30) On Monday, July 18, 1977, the Honorable Jenaro Collazo accompanied the Honorable Governor of Puerto Rico to the Congress of the United States where he testified on behalf of the people of Puerto Rico demanding equal treatment and in support of the 1977 Amendments to the Social Security Act.

(31) Codefendant Honorable Jenaro Collazo, as head of the Department of Social Services of the Commonwealth of Puerto Rico, advocates the termination of all statutory ceilings governing federal contributions and programs, the modification of the cost-sharing formulas in order to achieve equal treatment and the substitution of the existing formulas for a sliding scale based on need that would cause a significant rise in federal expenditures for the implementation of the federal assistance programs, including the AFDC."

APPENDIX A-III

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 1099-72

JESUS RODRIGUEZ CINTRON, PLAINTIFF

vs.

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare[1], DEFENDANT

OPINION

PESQUERA, D.J.

We are called upon to decide whether the Constitution of the United States bars Congress from excluding United States citizens who reside in Puerto Rico from welfare aid extended by Congress generally to the inhabitants of the fifty states and the District of Columbia.

Plaintiff challenges the exclusion of said United States citizens from benefits under Section 228,[2] 42

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[1] Caspar Weinberger succeeded Elliot Richardson as Secretary of Health, Education and Welfare of February 8, 1973. Caspar Weinberger was substituted, therefore, for Elliot Richardson as the defendant in this suit. No further action need be taken to continue the suit by reason of the last sentence of Section 205(g) of the Social Security Act, 42 USC 405(g) (1970).

[2] The pertinent portion of Section 228 provides:

"(a) Every individual who —

(1) has attained the age of 72,

(2) attained such age before 1968, or

(B) has not less than 3 quarters of coverage, whenever acquired, for

USC Section 428, Title II of the Social Security Act, which extends certain monthly benefits to residents of the United States who attained the age of 72 before 1968 or had certain quarters of coverage whenever acquired for each calendar year elapsing after 1966 and before the year in which he attained the age of 72. Section 228(e) limits the term United States to the fifty states and the District of Columbia. The exclusion of citizens of the United States who reside in Puerto Rico from said benefits has been attacked by plaintiff as an invidious discrimination violative of the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

The facts are not in dispute. Plaintiff Jesús Rodríguez Cintrón is a resident of the Commonwealth of Puerto Rico who attained the age of 72 prior to 1968. He filed his application for benefits under Section 228, which was denied solely because he was not a resident of the United States within the meaning of Section 228 of the Social Security Act. After exhausting the appropriate administrative remedies without

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each calendar year elapsing after 1966 and before the year in which he attained such age,

(3) is a resident of the United States (as defined in subsection (e) of this section), and is (A) a citizen of the United States or (B) an alien lawfully admitted for permanent residence who has resided in the United States (as defined in section 410(i) of this title) continuously during the 5 years immediately preceding the month in which he files application under this section,

.....

(e) The benefit to which any individual is entitled under this section for any month shall not be paid if, during such month, such individual is not a residente of the United States. For purposes of this subsection, the term 'United States' means the 50 States and the District of Columbia."

success, plaintiff timely brought the present action, claiming on his own behalf and on behalf of all persons similarly situated that the exclusion in Section 228 was an invidious discrimination violative of the equal protection principles incorporated in the Fifth Amendment of the Constitution of the United States. Plaintiff sought a declaratory judgement and an injunction against enforcement of the exclusion. He further requested that the case be certified as a class action. This Court was convened pursuant to 28 USC Section 2282 (1970) and the case was certified as a class action. The parties agreed to submit their arguments in the form of written memoranda. They have presented well reasoned and elaborate briefs for our consideration.

Plaintiff argues that the residents of Puerto Rico, as American citizens, are protected in their relation to the Federal Government by the fundamental principles of the Constitution of the United States, including the constitutional right to equal protection which has been read into the Fifth Amendment of the Constitution. He argues that the exclusion must be strictly scrutinized by this Court since welfare aid for the aged is a fundamental right and also that the exclusion of residents of Puerto Rico is a suspect classification. He claims that in order for his exclusion from the benefits to withstand strict constitutional scrutiny, a compelling state interest justifying the exclusion must be shown. He further claims that such compelling interest is lacking and more so, that no rational relation between the purposes of the statute and the exclusion exists.

sion of the Constitution of the United States. That must mean that the people of Puerto Rico, who remain United States citizens, are entitled to invoke against the Commonwealth of Puerto Rico the protection of the fundamental guarantee of due process of law, as provided in the federal Constitution. For our present purpose it is unnecessary to determine whether it is the due process clause of the Fifth Amendment or that of the Fourteenth Amendment which is now applicable; the important point is that there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States."

The present case is, of course, differet from *Mora* v. *Mejía*, supra, and *Montalvo* v. *Colón*, supra, in that said cases dealt with conduct of the Commonwealth of Puerto Rico as applied to residents of the Commonwealth. Here the Constitution of the United States is invoked against action of the Federal Government challenged as violative of the Fifth Amendment of the Constitution. The principle stated in *Mora* v. *Mejía*, supra, to the effect that there cannot exist under the American flag any governmental authority untrammeled by the requirement of due process of law is equally applicable to the Federal Government in relation to United States citizens in the Commonwealth of Puerto Rico, the territorial powers under Article IV, Section 3 notwithstanding. *Reid* v. *Covert*, 354 US 1 (1956).[5]

[5] In *Reid* the Supreme Court said that the Insular cases were to be distinguished in that "they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the bases for governmental power is American citizenship. None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians. Moreover, it is our judgement that neither the cases nor their reasoning should be given any further expansion."

Thus, we hold that the Fifth Amendment of the Constitution binds the Federal Government in its exercise of power over the residents of Puerto Rico and that American citizens who are residents of Puerto Rico are entitled to benefit from the principles of equal protection read into the Fifth Amendment of the Constitution. *Reid* v. *Covert*, supra; *Bolling* v. *Sharpe*, 347 US 497 (1954); *Shapiro* v. *Thompson*, 394 US 618 (1969); *Schneider* v. *Rusk*, 377 US 163 (1963).

Having focused on the applicability issue, we now consider and rule on the specific constitutional question before us: whether the exclusion complained of by plaintiff contravenes the Fifth Amendment, which forbids discrimination that is so unjustifiable as to be violative of due process. *Schneider* v. *Rusk*, supra.

Section 228 of the Social Security Act, also known as the Prouty Amendment to the Tax Adjustment Act of 1966, was intended basically to extend social security protection to some 1.5 million Americans who were excluded from the social security system, either because their jobs were not covered by social security during their working years or because they retired before their jobs were covered by the social security system. As originally proposed by Senator Prouty,

the amendment would have conferred upon about 1.5 million citizens seventy years or more old monthly benefits of $45.00 plus $22.50 for their spouses. The amendment was originally intended to include all residents of the United States as defined in Section 210(I) of the Social Security Act, in which the term United States includes the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and American Samoa. The measure was the subject of debate in the Senate. The proponents supported the measure to fight poverty among the aged, 112 Cong. Rec. 5290, and as a step to some kind of basic social security available to everyone, 112 Cong. Rec. 5292. The funds to finance the provision would have come initially out of the Federal Old Age and Survivors Insurance Trust Fund which would have been reimbursed by the General Treasury. See 113 Cong. Rec. 5289. The opponents of the measure argued that such appropriations would put the budget further out of balance. See 112 Cong. Rec. 5929.

After the Senate approved the Prouty Amendment by a slim margin, it went to conference with the House of Representatives which narrowed the definition of the term residents of the United States to exclude residents of Puerto Rico, Virgin Islands, Guam and American Samoa. As a result of this exclusion, as well as other amendments, the number of persons covered by the provision was reduced from 1.5 million to 370,000 and the expected cost of the provision in its first year was reduced from 700 million to 95 million dollars, see 112 Cong. Rec. 5291-92, 5792-93, 5946. The legislation as recommended by the

conference committee was passed by both houses of Congress, 112 Cong. Rec. 5801, 5870 and became law upon the signature of the President, 112 Cong. Rec. 6273.

The legislative history of the provision reveals that in enacting Section 228, Congress established a national program of benefits for the needy aged not covered under other governmental plans, but limited its original scope by reason of its cost. The legislative history reveals no grounds other than that of cost to explain the exclusion of residents of Puerto Rico from the program's benefits.

We must reject the claim that welfare aid to the aged is a fundamental right under the Constitution of the United States. See *San Antonio Independent School District* v. *Rodríguez*, 411 US 1 (1973); *Dandridge* v. *William*, 397 US 471 (1970); *Richardson* v. *Belcher*, 404 US 78 (1971). But a claim that the statute creates a classification that excludes a suspect class is a much more serious question. The residents of Puerto Rico considered as a class have the indicia of suspectness necessary to invoke the strict scrutiny test and qualify as an example of a "discrete and insular minority for whom such heightened judicial solicitude is appropriate". See *Graham* v. *Richardson*, 403 US 371, 375 (1971).

Although the residents of Puerto Rico were granted full citizenship in 1917, their political condition within the American system of government can hardly be considered equal. In spite of the fact that the Commonwealth has obtained a large measure of self government and its own constitution, see *Calero-*

Toledo v. *Pearson Yacht Leasing Co.*, supra, with respect to the acts of the Federal Government, executive or legislative United States citizens residing there are completely disenfranchised. In *San Antonio Independent School District*, supra, the Supreme Court defined a *suspect class* as (1) one saddled with such disabilities or (2) subjected to a history of unequal treatment or (3) relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian politican process. 411 US at 28. With regard to federal legislation which is generally applicable to Puerto Rico, the residents of the Commonwealth are completely powerless and are in a position similar to that of the District of Columbia. *United States* v. *Thompson*, 452 F2d 1333 (1971), Cert. denied, 405 US 1075 (1972). There, the United States Court of Appeals for the District of Columbia Circuit stated at page 1340:

> "What is involved here is not just any arbitrary classification between two similarly situated groups. The residents of Washington occupy a profoundly anamalous position in the federal system, and any classification which discriminates against them is particularly suspect. Writing for the Court in Reynolds v. Sims, supra, Chief Justice Warren observed: 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' But for the residents of the District, the right to vote in congressional elections is not mereley restricted —it is totally denied.

. . . . . .

> Although the courts have a vital role to play in preserving our constitutional rights, we normally depend upon the vote as 'preservative of other basic civil and politcal rights'. Minorities can usually protect themselves by playing their role in the political process and forming coalitions with other groups to secure a majority. But it is senseless to remit District residents to the political process, since for them there is no political process. The principle of majority rule loses its legitimacy when not all the votes are counted. See Developments in the Law-Equal Protection, 82 Harv. L. Rev. 1065, 1124-1126 & n.275 (1969). In this contex, at least, the normal arguments for judicial restraint become no more than hollow shibboleths grotesquely detached from the logic which once supported them. There is no reason to pay deference to the views of a representative body which does not in fact represent those against whom it is discriminating. Therefore, discriminatory classifications affecting District residents must be subjected to the strictest possible review."

The Court had also said at page 1339:

> "...when Congress decides to enact national legislation, the situation is fundamentally different. The passage of such a law implies a threshold decision to override regional differences in favor of a uniform standard that will govern the entire country. If one small isolated group is then excluded from the operational effect of the sta-

tute, the rationality of that exclusion is highly suspect."

Defendant contends that the exclusion was not intended to apply to residents of Puerto Rico as a class, as it also excludes those from Virgin Islands, Guam, and American Samoa and that residents of Puerto Rico would not be excluded from the benefit should they live in the fifty states or the District of Columbia. Defendant argues that the classification is based on geography and not to discriminate against American citizens who reside in Puerto Rico. This reasoning we must reject as fallacious. The simple fact that in order to receive the benefits American citizens residing in Puerto Rico would have to move out to the fifty states or the District of Columbia is tantamount to discriminatory treatment. Although the exclusion applied is designed in terms of geographical exclusion, the effect of the exclusion is on the American citizens who are residents of Puerto Rico.

We fail to find in such arguments either a compelling state interest or even a rational relation to the purpose of the statute.

The concern of Congress for the cost of the program cannot justify an invidious discrimination. In *Shapiro* v. *Thompson*, supra, the Supreme Court said:

"We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could

not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellant must do more than show that denying welfare benefits to non residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification."

The same concern for fiscal integrity was rejected in *Graham* v. *Richardson*, 403 US 371 (1971) and in *Morton, Secretary of the Interior* v. *Ruiz*, 415 US 199 (1974). In the latter case, the Supreme Court said:

"Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries."
415 US at 231.

The given fact that the residents of Puerto Rico are not generally liable to pay Federal income taxes does not afford the missing compelling state interest nor does it present a rational relation to the purposes to be accomplished by the statute.

Given the purpose of Section 228 to create a

national program of some basic economic aid to elderly American citizens who had been left out of the social security system, to exclude a considerable number of otherwise qualified American citizens will not rationally advance the purpose of the statute. Such exclsuion does not appear to be imperative or compelling. Residents of Puerto Rico have been a part of the social security system since 1950 and have contributed to the system in the same manner that the residents of the fifty states and the District of Columbia. Puerto Rico too has elderly residents who have been left out of the social security system.[6] And the elderly of Puerto Rico are not inmune from the affliction of poverty in old age.[7]

The fact that Congress has not extended the internal revenue laws to Puerto Rico and therefore exempts Puerto Rican residents generally from the payment of Federal income taxes does not supply any valid justification compelling or otherwise. For the situation is like that presented in *Shapiro* v. *Thomp-*

[6] According to the census of 1970, there were around 28,368 persons who had reached seventy two before 1968. This group included 13,354 males and 14,512 females. See General Population Characteristics, Puerto Rico, 1970, US Department of Commerce, PC (1), P. 53, PRP 5352, 53.

[7] "The impact of inflation has been especially severe on Puerto Rico because of its geography, the nature and stage of development of its economy. Having an area of only 3,435 square miles, a population density of over 850 persons per square mile, with limited agricultural land and few indigenous raw materials, Puerto Rico imports the bulk of its basic commodities. Basic commodity shortages, both real and artificial, have been the root cause of the present worldwide inflation. Puerto Rico imports most of its commodities from the United States. Their prices in Puerto Rico have been further inflated by the 47 per cent increase in ocean freight rates granted to carriers during the past two years.

son, supra, where the Supreme Court stated:

> "Appellants' reasoning would logically permit the state to bar new residents from schools, parks and libraries or deprive them of police or fire protection. Indeed it would permit the state to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportion of state services."
> 394 US at 632.

't concluded that the limitation of welfare benefits to those regarded as contributing to the state was not a constitutionally permissible state objective.

We may add that to take the fact of nonpayment of taxes into consideration for the purposes of validating the exclusion is antithetical to the moral and constitutional principles upon which our nation is based and repugnant to the idea of equality of all its citizens. American citizens residents of Puerto Rico may be called into the Armed Forces and have given many lives in the defense of the nation. They have migrated

Everywhere, the poor are hardest hit by inflation and economic stagnation. More of their income is spent for the basic foods and they are the first to lose their jobs and the last to be reemployed. In Puerto Rico, per capita personal income is currently only one-third the U.S. average and the 1970 Census showed that 60 per cent of all Puerto Rican families were below the U.S. 'poverty threshold'. During fiscal year 1974 the island experienced an average inflation rate of 12.6 per cent. However, during the first semester of calendar 1974 the average increase in prices was over 13 per cent. Inflation has been particularly severe in the case of imported foodstuffs."
Commonwealth Government Report, *Inflation and the Economy of Puerto Rico*, submited for consideration at President Ford's economic summit meeting in Washington, September 27, 1974.

through and lived in many states, working in the several states and contributing to the growth and culture of the nation. See *Graham* v. *Richardson*, supra. It has been said by a scholar in the matter:

> "Realistically reviewed, Puerto Rico, both before and after Commonwealth, has long been integrated into the network of national legislation and national economic relationships. With the exception of Federal tax laws, the Interstate Commerce Act and a few federal statutes of lesser significance, almost all national legislation applies to Puerto Rico. Similarly, almost everything Puerto Rico sells and practically everything which is purchased from outside the Island, is to and with the United States national economy."
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> Helfeld, *How Much of the Federal Constitution is Likely to be Held Applicable to Puerto Rico?*, 39 Revista Jurídica de la Universidad de Puerto Rico 169 n. 88 (1970).

The United States of America is more than anything a community of American citizens and not merely a conglomerate of geographical entities. All the citizens of a community are entitled to equal and full citizenship. As clearly stated in *Schneider* v. *Rusk*, 377 US 163 (1964)

> "...while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process'. Bolling v. Sharpe, 347 U.S. 497, 499. ...The discrimination addressed at naturalized citizens drastically limits their rights to live

> and work abroad in a way other citizens may. It creates indeed a second class citizenship."

The proposition of a second class citizenship was early rejected by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):

> "For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizens of the United States; ..."

We would not be acting in the best tradition of American jurisprudence if we tried to justify or rationalize something that is repellent to the judicial instinct of equality and justice for all.

Accordingly, we conclude that the definition of the term United States as defined in Section 228(e), Title II of the Social Security Act is unconstituonal and void and that the enforcement of such definition and exclusion of United States citizens who reside in Puerto Rico contained in said section must be and is hereby enjoined. Plaintiff's class[8] covered by the present action is entitled to apply for benefits under Section 228 considered without taking into consideration whether they are residents of Puerto Rico and should receive the benefits if otherwise duly qualified.

/s/ José V. Toledo
Chief District Judge
Hernán Pesquera
District Judge

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[8] The class here in designated comprises all individuals residents of Puerto Rico who attained the age of seventy two years before 1968 or having attained said age after 1968 had at least three (3) quarters of

McENTEE, *Circuit Judge*, (dissenting). After prolonged reflection I find I cannot agree with the decision of the majority in this case and therefore briefly dissent for the following reasons. (1) Puerto Rico occupies a unique position in relation to the United States, Leibowitz, *The Applicability of Federal Laws to the Commonwealth of Puerto Rico*, 56 Geo. L.J. 219, 270 (1967). It has never been held, and I cannot subscribe to the proposition, that residents of Puerto Rico constitute a suspect class for equal protection purposes, *see* Gunther, *The Supreme Court, 1971 Term —Foreward: In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 12-15 (1972); Puerto Rico's singular status makes analogy to the District of Columbia unpersuasive. Provided it does not resort to invidious distinctions, Congress has a valid interest in preserving the fiscal integrity of its welfare programs. *Shapiro* v. *Thompson*, 394, U.S. 618, 633 (1969). Although Puerto Rico has received less favorable treatment than the states under a number of other social programs, Leibowitz, *supra* at 269-70, this discrimination apparently has never been thought to be amenable to equal protection challenge. Although I sympathize with the plight of the plaintiff class, I would dismiss the complaint.

/s/ United States
Circuit Judge

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coverage of the Social Security Administration whenever acquired for each calendar year elapsing after 1966 and before the year said persons attained such age, and are citizens of the United States or aliens lawfully admitted for permanent residence in the United States.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-303

[Filed Aug. 17, 1978]

AWILDA SANTIAGO ROSARIO, ET AL., PLAINTIFFS

vs.

JOSEPH A. CALIFANO; JENARO COLLAZO, ET AL., DEFENDANTS

OPINION AND ORDER

The complaint in this case was filed on February 23, 1978, the jurisdiction of the Court having been invoked under the provisions of Sections 1331, 2201 and 2202 of Title 28, United States Code, and Section 405(g) of Title 42, United States Code.

At stake herein is the constitutional validity of the Aid to the Families with Dependent Children Program (AFDC), as contained in Title 42, United States Code, Sections 603(a)(2), 1396d(b) and 1308(a). Plaintiffs challenge the formulas and the ceiling established by Congress for determining the reimbursement to the Commonwealth of Puerto Rico for payments made to the United States' citizens who reside in Puerto Rico under the ADFC Program on the ground that they create an arbitrary and discriminatory distinction against a suspect class of the

United States' citizens residing in Puerto Rico, and infringes on their fundamental rights to equal treatment, and their right to travel, thereby violating the due process clause of the Fifth Amendment to the United States' Constitution and its equal protection component.

On September 2, 1977, we issued an Order whereby this case was certified as a class action pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure. The plaintiff class was accordingly defined as "all United States citizens residing in the Commonwealth of Puerto Rico, which are recipients of public assistance under the Aid to the Families with Dependent Children category and that have been, are and will be discriminated solely on the basis of their residence."

At that moment we also ruled on codefendant Genaro Collazo's motion to dismiss and denied the same.

Thereafter, on May 16, 1978, defendant Joseph Califano, Secretary of the United States Department of Health, Education and Welfare filed a motion for summary judgment, which was opposed to by plaintiffs on July 7, 1978. The matter stands thus submitted for our consideration.

THE MOTION FOR SUMARY JUDGMENT

In support of the motion for summary judgment it is alleged that there are no material facts in dispute and that the Secretary of Health, Education and Welfare is entitled to judgment as a matter of law. Ac-

cording to the moving codefendant the legal ground which entitle him to a judgment in his favor are: (a) under the ruling of the Supreme Court of the United States in *Califano* v. *Torres*, 43 LW 3539 (February 2, 1978, the formulas and ceilings applicable to AFDC Reimbursement to Puerto Rico do not violate plaintiffs' right to travel; (b) the formulas and ceilings applicable to AFDC Reimbursement to Puerto Rico do not violate plaintiffs' rights to equal protection.

In their opposition to the motion for summary judgment plaintiffs have informed the Court that they will not pursue the right to travel claim in view of the holding of *Califano* v. *Torres*, supra. They strongly oppose, however, the rest of defendants' arguments in support for summary judgment by advancing the following grounds:

(a) there are material facts in controversy which preclude the issuance of a summary judgment pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure.

(b) plaintiffs' rights to equal protection have been violated.

ANALYSIS

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be entered when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In regard to the granting of a motion for summary judgment,

the First Circuit Court of Appeals stated the ruling standards in the case of *Hahn* v. *Sargent*, 523 F. 2d 461 (1 CA, 1975), cert. denied 425 U.S. 904 (1976):

> ". . . In determining whether summary judgment is appropriate the court must "look at the record . . . in the light most favorable to . . . the party opposing the motion . . ." *Poller* v. *Columbia Broadcast System*, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L.Ed. 2d 458 (1962). Similarly the court must indulge all inferences favorable to the party opposing the motion. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L.Ed. 2d 176 (1962); *Rogen* v. *Ilikon*, 361 F.2d 260, 266 (1 CA, 1966). These rules must be applied with recognition of the fact that it is the function of summary judgment, in the time hallowed phrase, "to pierce formal allegations of facts in the pleadings . . .", *Schreffler* v. *Bowles*, 153 F. 2d 1, 3 (10 CA, 1946), and to determine whether further explorations of the facts is necessary. *Briggs* v. *Kerrigan*, 431 F. 2d 967, 968 (1 CA, 1970).

The language of Rule 56(c) sets forth a bifurcated standard which the party opposing summary judgment must meet to defeat the motion. He must establish the existence of an issue of fact which is both "genuine" and "material". A material issue is one which affects the outcome of the litigation. To be considered "genuine" for Rule 56 purposes a material issue must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of*

> *Arizona* v. *Cities Service Co., Inc.*, 391 U.S. 253, 289; 88 S. Ct. 1575, 1592, 20 L.Ed. 2d 569 (1968). The evidence manifesting the dispute must be "substantial", *Firemans Mut. Ins. Co.* v. *Aponaug Mfg. Co., Inc.*, 149 F. 2d 359, 362 (5 CA, 1945), going beyond the allegations of the complaint. *Beal* v. *Lindsay*, 468 F. 2d 287, 291 (2 CA, 1972)." *Id.* at 464.

It is with the above standards and objective in mind that we must examine the present action. *Hahn*, supra, at 464.

Plaintiffs' contentions that there is a controversy as to material facts which preclude the issuance of a summary judgment must be examined in the first place.

Plaintiffs make reference to the Pretrial Order signed by them and codefendant Califano submitted on August 24, 1978, before the Honorable Magistrate Perez Gimenez. Specific reliance is made on Paragraphs 1, 2, 3 and 4 of the part of that Order titled by the parties as "Facts in Dispute":

> "1. Whether the present formulas and ceilings applicable to Puerto Rico have the effect of preventing the Puerto Rico Secretary of Social Services from establishing a standard of need and a payment standard which adequately provides recipients in Puerto Rico with funds to cover their minimum and basic needs.
>
> 2. Whether the recipients of public assistance in Puerto Rico have been and are adversely affected by the application of said formulas and ceilings in the amount of money payment re-

ceived by them and in the promptness with which the applications are processed.

3. Whether the Commonwealth of Puerto Rico will increase the benefits to these plaintiffs under AFDC if the formulas used to determine federal reimbursements were the same as those utilized in the States if no ceiling applied.

4. Whether Puerto Rico has reached its ceiling under 42 U.S.C., Section 1308 during the past 27 years."

Codefendant Califano typifies the above facts as speculative in nature and in turn argues that such speculation cannot vest plaintiffs with the required standing to bring this action. Thus, we must determine whether the above are indeed, as plaintiffs contend, "material facts" in controversy or an allegation of speculative injury which does not provide plaintiffs with the "personal stake" in the outcome of the controversy necessary to confer standing.

Codefendant claims that plaintiffs can only speculate that the Commonwealth would raise the standards for AFDC if a higher formula were available. In support of this contention Califano cites a series of cases for the proposition that speculative injury does not provide the "personal stake" in the outcome of the controversy necessary to confer standing.

The first of the cases cited by defendant is *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). However, in *Simon* the Court concluded that plaintiffs lacked standing, an essential component of the Article III requirement of "case or controversy" because the defendants brought therein were not the

ones who had caused the alleged injury to claimants. Thus, the Court stated at pp. 41-42:

> ". . . In other words, the "case or controversy" limitations of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party before the Court." *Id.*

In *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), the next case cited by defendant, the Supreme Court construed Section 10 of the Administrative Procedure Act as failing to confer standing on a private association challenging federal action which permitted commercial exploitation of a national game refuge since the association had not asserted that its members were users of the valley and hence among those materially injured by the alleged change of aesthetics and ecology of the area.

The next case cited by defendant in fact favors plaintiff's position. In *Association of Data Processing Service Org., Inc.* v. *Camp*, 397 U.S. 150 (1970), the Supreme Court found that *prospective* economic injury did in fact create the required personal stake to confer standing. In this sense the present case presents a more concrete allegation of "personal stake" because the injury alleged by the representatives of the plaintiffs' class is not prospective but one which has *actually* taken place.

The last case of the line cited by defendants is *O'Shea v. Littleton*, 414 U.S. 488 (1974). In said case

no standing was found to exist when the court found that plaintiffs had failed to show the requisite "injury in fact" in a class action brought to enjoin the alleged racially discriminatory administration of the Cairo, Illinois' system of criminal justice, where it was not shown that they faced imminent prosecutions. For the same reasons stated in regard to *Data Processing*, this case is inapposite to the facts alleged herein.

In the present case, in their opposition to the motion for summary judgment, plaintiffs have controverted the allegation of defendant by submitting documentary evidence to support, at least at this pretrial stage, the contention that the Commonwealth would raise the AFDC standards if the federal statutory formula were increased. Plaintiffs have included statements by the Governor of Puerto Rico and by the Resident Commissioner before the United States Congressional Committees, testifying in support of giving equal treatment to Puerto Rico in the AFDC program, among others. See Appendixes 3 and 6 to plaintiffs' *Memorandum of Law*, filed on July 7, 1978. Thus, a "nexus" or a chain of causality has been alleged connecting defendants with the alleged wrong. All of the above lead us to conclude that plaintiffs' claim is not one of speculative injury which would deprive them of the required "personal stake" so as to grant them standing to pursue the present claim. See also: *McRae* v. *Mathews*, 421 F. Supp. 533 (1976).

After having determined that plaintiffs have the required standing to bring the present action, we must

now determine whether summary judgment should be granted in favor of defendant Califano. Said party would like us to conclude that, in any event, the complaint should be dismissed against him because plaintiffs' equal protection rights have not been violated due to the fact that Congress' decision to treat Puerto Rico differently from the fifty States is a rational one.

We find that in the present case we cannot conclude, at this stage, that defendant is entitled to a judgment in his favor as a matter of law. There are issues of ultimate facts, both "genuine" and "material" which bars a summary judgment in this case.

We are not ready to conclude that the decision of the Supreme Court in *Califano* v. *Torres*, squarely faced and ruled upon the equal protection claim. Thus, even if there were no material facts in controversy, we still would be faced with the problem of not being convinced that the complaint should be dismissed as to the equal protection claim "as a matter of law".

Wherefore, codefendant Califano's motion for summary judgment is hereby DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, August 17, 1978.

/s/ Jose V. Toledo
JOSE V. TOLEDO
Chief Judge
U.S. District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-303

[Received & Filed Oct. 9—3:12 PM '79—
Clerk's Office—U.S. District Court—San Juan, P.R.]

AWILDA SANTIAGO ROSARIO, ET AL., PLAINTIFFS

vs.

JOSEPH A. CALIFANO, JR,. ETC., ET AL.,
DEFENDANTS

PARTIAL JUDGMENT

The Court having entered an Opinion and Order through Hon. José V. Toledo and there being no just reason for delay

It is ORDERED AND ADJUDGED that defendant Joseph A. Califano's motion to dismiss be denied and

It is further ORDERED AND AJUDGED that partial summary judgment be entered in plaintiff's favor declaring Sections 1396(d)(b)(2) and 1308 unconstitutional.

IT IS SO ORDERED.

San Juan, Puerto Rico, October 5, 1979.

/s/ Ramon A. Alfaro
RAMON A. ALFARO
Clerk of the Court

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

Civil No. 77-303

[Received & Filed Oct. 31—4:19 PM '79—
Clerk's Office—U.S. District Court—San Juan, P.R.]

AWILDA SANTIAGO ROSARIO; GLADYS PEREZ CENTENO; CARMEN L. RIVERA BERRIOS; LUZ MARIA PAGAN ROJAS; LYDIA R. APONTE SEPULVEDA; FAUSTINO DIAZ LOPEZ; on behalf of themselves, their children, and all others similarly situated, PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education, and Welfare; HONORABLE GENARO COLLAZO, Secretary of the Department of Social Services of Puerto Rico; their subordinates and agents in their individual and personal capacity, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the defendants hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. 1252, from the Judgment of the U.S. District Court for the District of Puerto Rico, entered in this action on October 3, 1979.

Dated at San Juan, Puerto Rico, this 31st day of October, 1979.

JOSE A. QUILES
United States Attorney

/s/ Jose A. Acosta-Grubb
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